No. 79-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WAYNE MINNICK, *et al.*,
Petitioners,

v.

CALIFORNIA DEPARTMENT
OF CORRECTIONS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Is the decision of the California Court of Appeal which contemplates further state court proceedings a final judgment?

2. Do the State courts have jurisdiction over actions brought under Title VII of the Civil Rights Act of 1964?

3. Does Title VII prohibit the California Department of Corrections from voluntarily adopting a race- and sex-conscious affirmative action employment program which imposes no mandatory quotas and is designed both to remedy the continuing consequences of past discrimination and to further other compelling correctional objectives?

4. Does the Equal Protection Clause of the Fourteenth Amendment bar the California Department of Corrections from voluntarily adopting a race- and sex-conscious affirmative action employment program which imposes no mandatory quotas and is designed both to remedy the continuing consequences of past discrimination and to further other compelling correctional objectives?

PARTIES

Petitioners are identified in the Brief for Petitioners. Respondents are the California Department of Corrections and Ruth L. Rushen, as Director of the California Department of Corrections, who succeeded Jiro J. Enomoto on April 22, 1980. *See* Sup. Ct. R. 40.3. The judgment entered by the California Superior Court did not run against Carlos Sanchez, formerly Assistant Director of the Department of Corrections, nor did it run against the California State Personnel Board. *See* Petn. App. E2, F2, G1; R.T. 279, 1495. Petitioners did not cross-appeal from the failure to include these parties in the judgment and therefore they are no longer parties to these proceedings.

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CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

STATUTES INVOLVED

In addition to the constitutional provisions and statutes cited by Petitioners (Pet. Br. 2; Pet. App. H), this case involves California Government Code §§18930, 19702, 19702.1, 19702.2, 19702.5 and 19790-97 and California Labor Code §§1413 and 1420. These are set forth in Appendix A.

STATEMENT OF THE CASE

Petitioners, two white male correctional officers and the California Correctional Officers Association, filed this action in the California state courts in December 1975, contending that the Affirmative Action Plan voluntarily adopted by the California Department of Corrections on July 1, 1974, discriminated against white males in violation of various state and federal

constitutional and statutory provisions. C.T. 6-7, 69.[1] The individual petitioners alleged that they had been denied promotions because they were Caucasian. C.T. 8, 10, 69-73.[2] After an order to show cause was issued (C.T. 34), the parties stipulated that the hearing on the preliminary injunction was to be considered the trial on the merits. C.T. 105.

In answer to a pretrial interrogatory, before the decision by the California Supreme Court in *Bakke v. Regents of the University of California,* 18 Cal. 3d 34 (1976), *aff'd in part, rev'd in part,* 438 U.S. 265 (1978) (hereafter "*Bakke*"), the Department stated that "for purposes of this litigation" it did not allege that it had "wilfully, with a specific intent" engaged in illegal or improper discrimination against individuals on the basis of race, color, sex, or national origin; it did, however, allege that its past hiring and promotional practices and procedures had had an adverse discriminatory impact on minorities and women. C.T. 122-23.[3] Some evidence of past discriminatory practices within the Department was introduced during the trial,[4] and substantial evidence was offered to show

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[1] The Clerk's Transcript will be cited as "C.T."; the Reporter's Transcript as "R.T."; the appendices to the Petition for Writ of Certiorari as "Petn. App."; and the Brief for Petitioners as "Pet. Br."

[2] The action was brought as a class action. C.T. 2. Petitioners' post-trial motion to certify the case as a class action (C.T. 1143-44) was denied, upon a stipulation that the named plaintiffs had standing to obtain prospective relief despite the failure of proof as to their own claims. R.T. 1465-68. The Court of Appeal questioned the validity of this stipulation and indicated that these questions should be examined if the case is retried. Petn. App. A23-24.

[3] Petitioners' brief asserts that Respondents "filed a binding answer to interrogatories denying that they had ever previously engaged in any prior discrimination." Pet. Br. 3; *see also id.* 15, 31-32. Petitioners thus mischaracterize the content of the Department's answer. Moreover, interrogatory answers are not binding in California. *Williams v. American Cas. Co.*, 6 Cal. 3d 266, 275, 98 Cal. Rptr. 814, 820 (1971). *Cf.* Advisory Committee's Note to Rule 33(b), 48 F.R.D. 487, 524 (1970).

[4] With respect to racial discrimination, *see, e.g.*, Ex. "Q"; R.T. 212-13, 338, 370-72, 443, 681, 706-708, 774, 824-25, 867-73, 879, 883, 903. With respect to sex discrimination, *see, e.g.*, Ex. "I"; R.T. 555-57, 608, 698. At several points, the Superior Court appeared to acknowledge the existence of prior discrimination, and to suggest that no further proof was necessary to establish that fact. R.T. 344, 380, 426-27, 661-62, 708, 883.

that the Department's Affirmative Action Plan was adopted to remedy a marked underrepresentation of minorities and women in the Department's work force, especially at supervisory levels.

This evidence revealed that historically most of the institutions within the Department were staffed almost exclusively by white males. R.T. 547, 593, 879, 892-893; *see also* C.T. 502. In 1968, when the Department of Corrections initiated its first informal affirmative action efforts, minorities constituted approximately 9.5% of the Department staff. Ex. "Q" at 1; R.T. 885. In 1973, shortly before the formal Affirmative Action Plan was adopted, minority members accounted for 19.8% of the Department's total personnel, in contrast with 23.7% of the California labor force. Ex. "G" at 26; R.T. 527; Ex. "R", Table 1A, R.T. 1494. The corresponding numbers for the prisons alone—i.e., excluding the Parole Division and Central Office—reflected even greater underrepresentation of minorities, particularly at certain institutions. Ex. "G" at 29; R.T. 527. For example, at the Sierra Conservation Center at Jamestown, the staff consisted of only 0.5% blacks and 3.2% Mexican-Americans; at the California Men's Colony at Corona, there were only 2.2% blacks and 4.8% Mexican-Americans; and at the California Conservation Center at Susanville, only 1.2% were black and 3.1% Mexican-Americans. *Id.* at 30. With clerical and lower level positions excluded, the disparity was still more pronounced. *Id.* at 21-22, 33-34.[5]

Due to their concentration in lower-level positions, the Department's minority employees earned less than their white counterparts. As of September 1973, 69.7% of the Caucasian personnel earned $900.00 per month or more, while the

[5] For example, in September, 1973, the Department employed 186 Correctional Lieutenants, of which 176 were Caucasian, eight were Spanish-surnamed and two were black. Ex. "G" at 34. Of 400 Correctional Sergeants, 355 were Caucasian, 22 Spanish-surnamed, and 20 black. *Id.* Thirty-one of 33 Correctional Counselor IIIs were Caucasian, as were 65 of 73 Correctional Counselor IIs. *Id. See also* the documentation submitted with the Motion to Augment Record. C.T. 704, 832-33, 836, 848-49, 853, 875, 883, 889, 899, 909-10, 926, 932, 936, 940, 944-45, 947-48, 951, 955, 964, 967-68, 976-77.

If the "traditional census undercount of minorities" and the apparent increase in the proportion of the minority population since 1970 are considered, see California Advisory Committee to the U.S. Commission on Civil Rights, *California State Employment* 2 (1980), the disparity is even greater.

comparable figures for blacks and Spanish-surnamed personnel were 46.3% and 45.2% respectively. *Id.* at 32. The monthly weighted average salary for Caucasians was $1,116.86; for blacks, $998.98; and for Mexican-Americans, $970.91. *Id.* at 31.

Much the same was true with respect to female employees. As of September 1973, only 17.3% of the Department's total personnel was female, in contrast to 38.1% of the California labor force. *Id.* at 27. At the institutions, the percentages were significantly lower: at only two institutions (one of which was the California Institution for Women) did the proportion of female employees exceed 13%, and at many it was considerably less. *Id.* at 31. Moreover, more than 75% of the female employees were in clerical positions. *Id.* at 35. While only 26.6% of the Department's male employees earned less than $900 per month, 76.3% of female employees earned less. *Id.* at 32. The monthly weighted average salary for males was $1,091.71, while for females it was $795.01. *Id.* at 32.

The underrepresentation of minorities and women was not accidental. The record demonstrates, for example, that the low number of minorities in supervisorial positions resulted not only from a shortage of minority employees in entry level positions, but also from the fact that interview panels consisted almost exclusively of white males, whose prejudices unquestionably influenced the consistently low evaluations of minority officers. *E.g.*, R.T. 372, 824-25, 833, 872-73, 883.[6] Written tests also discriminated against minority groups. R.T. 370-71. Minority officers within the Department customarily received less desirable duty and shift assignments and were completely excluded from some posts. R.T. 212-13. As a result, the Department had difficulty retaining its minority employees, let alone promoting them. *See also* Appendix B.

The evidence also reflected the sharp contrast between the minority inmate population and the correctional work force. In 1973, the total inmate population contained 32.2% blacks, in

[6] For example, one middle-level manager—whose testimony Petitioners quote at length (Pet. Br. 7-8)—told a superior that he believed minorities were less qualified than whites. R.T. 774. This individual promoted only white employees. *Id.*

contrast to 8.8% within the correctional force, and 17.3% Mexican-Americans, in contrast to 7.4% of the work force. *See* Ex. "G" at 26. The evidence brought out the widespread presence of racial gangs throughout California's prisons (R.T. 340-41, 476, 560, 627, 899), and the ever-present danger of racial violence. *E.g.*, R.T. 548-64, 896-99; C.T. 494-96, 500-05, 510-11, 525-27, 541-42, 560-61.

It was against this background, and in response to mandates from California's Legislature and Governor (Ex. "G" at 48; *see* pp. 37-41, *infra*), that the Department's affirmative action efforts were initiated in 1968-69, and formalized in 1974. Exs. "G", "Q", "R", R.T. 338; *see also* C.T. 704-05, 710. The Affirmative Action Plan is predicated upon a detailed statistical study of the underrepresentation of minorities and women throughout the Department. Ex. "G" at 25-39; *see also* Ex. "Q". Its principal elements are summarized in the Statement of Policy appearing at the front of the formal program documents:

> "In order to insure compliance with equal employment opportunity laws and departmental policy, a formal Affirmative Action Program has been developed for immediate implementation. Specific actions required by this plan will include:
>
> A. Increase the number of minorities and women employees at all levels by implementing programs for recruiting, selecting, hiring and promoting minorities and women.
> B. Establish a monitoring system of all employment practices related to the employment of women and minorities.
> C. Establish specific goals, timetables and records for measuring success or failure in complying with laws of nondiscrimination.
> D. Provide in-service training that will develop a sensitivity in staff to recognize and positively deal with discriminatory practices, and provide training for women and minority employees that will assure their full participation at all levels of employment.

E. Insure that all employees have equal employment opportunities and equal treatment.

F. Insure that each institution, parole region and Central Office develop an Affirmative Action Plan that is in keeping with the departmental guidelines.

G. Insure that disciplinary action will be taken, as in any violation of major departmental policy, in instances where administrators or individuals give inadequate cooperation or obstruct the goals of the program." (Ex. "G" at 1).

The Plan's objective is "[t]o increase significantly the utilization of minorities and women across organizational units of the CDC and at all levels possible as vacancies occur." Ex. "G" at 10.[7] The Plan incorporated the then-current Guidelines issued by the federal Law Enforcement Assistance Administration,[8] which directed that the percentage of minority groups in the work force, within five years, be at least 70% of the minority percentage in the inmate population. Ex. "G" at 11-12; *see* R.T. 665-66.[9] The Plan's goal for female hiring is to achieve a proportion of women in the correctional work force corresponding to the proportion of women in the California labor force. *Id.*

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[7] According to the then Deputy Director, the goal of the program was, "very simply . . . to make the Department of Corrections a fair place to work." R.T. 665. *See also* R.T. 338. As further documented in the materials submitted with the Motion to Augment Record, the Plan was "designed in part to bring these discriminatory practices to an end and to undo the effects of these practices over so many years." C.T. 710; *see also* C.T. 969; R.T. 338, 665, 707; Exs. "G", "Q", "R". The Plan was also designed to lessen racial strife among inmates for which the discriminatory practices were considered partially responsible. *See* C.T. 703-04.

[8] 38 Fed. Reg. 23518 (1973). *See* Ex. "G", pp. 40-47; ABA Commission on Correctional Facilities and Services, *Minority Recruitment in Corrections—New Federal Aid Requirements* (1973); Skoler & Loewenstein, *Minorities in Correction—Nondiscrimination, Equal Opportunity, and Legal Issues*, 20 Crime & Delinquency 339, 345-46 (1974); *Hardy v. Leonard*, 377 F. Supp. 831, 835 n.2 (N.D. Cal. 1974). On February 16, 1977, these regulations were amended. *See* 42 Fed. Reg. 9493 (1977); 43 Fed. Reg. 28795 (1978). C.T. 586-601.

[9] In 1979, the Department slightly revised and extended its Affirmative Action Plan for an additional five years. A copy of the current Plan has been lodged with the Clerk.

In implementing the Plan, the Department has adhered to all civil service requirements and procedures. Applicants take written and oral examinations administered by the State Personnel Board and are ranked on certification lists according to their test performance. Cal. Gov't. Code §§ 18930, 18936. In making selections from the list, the Department is limited to the top three individuals or ranks who choose to be considered for the particular opening. Cal. Gov't. Code §§ 19057, 19057.1; 2 Cal Admin. Code §§ 254, 254.1; *see* R.T. 15-16, 20-23, 198-99, 214; Ex. 10, R.T. 90. It is only within the statutory selection process, among those found eligible under racially-neutral criteria, that consideration is given to the race and sex of applicants in making hiring and promotional decisions.[10] The policy at all times has been to hire and promote only the most qualified applicants (R.T. 194, 203-06, 333-34, 383, 452-53, 483, 487-88, 548, 563-64, 591, 666, 668, 672, 773, 777-78, 792, 882; Ex. 35, R.T. 727);[11] nonetheless, given the absence of minority personnel and the composition of the inmate population, the fact that a well-qualified applicant is a minority member is a factor which may enhance that applicant's qualifications for the particular position. R.T. 227-28, 284, 372-74, 382-83, 453-54, 498-99, 600, 793. Some Departmental representatives testified that if competing applicants were "reasonably equally qualified," the minority applicant would be selected. *E.g.*, R.T. 289, 601; *see* Ex. 16, p.3. However, as explained by other witnesses, the underlying concept is that the race and sex of applicants be considered in relationship to the needs of the position being filled, along with the many other factors that bear upon an individual's qualifications. *See* R.T. 195-97, 382-83, 488, 666-77, 707-08.

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[10] Efforts are also made to recruit or train minority members for openings that develop, but special training and staff development assignments, transfers and the like are made only in accordance with civil service requirements (*see, e.g.*, R.T. 214-17, 266-69, 345-51, 389-92; Ex. 2, p.2, R.T. 43, 45; Ex. 16, p.3; R.T. 101) and have not been challenged in this litigation. C.T. 68; Petn. App. F4. The Department has also requested that a small number of positions be certified by the State Personnel Board as limited to female only. *E.g.*, Ex. 24, R.T. 260, 394.

[11] Contrary to repeated statements throughout the Brief for Petitioners (e.g., Pet. Br. i, 9-10 13, 16) no evidence was introduced that a lesser qualified applicant was ever selected in preference to a more qualified non-minority male applicant, nor did the Superior Court enter any such finding.

The Department acknowledged that there has been some misunderstanding concerning the operation of the Affirmative Action Program (R.T. 664), and the record contains some evidence—upon which Petitioners heavily relied—suggesting that under the Department's program only minority or female candidates would be considered for some positions. *E.g.*, Ex. M., R.T. 685, 686; Ex. 1, R.T. 38, 45; Ex. 2, R.T. 43, 45; Ex. 28, R.T. 462, 465. However, Department officials testified that this is not and never has been the policy of the Department; when such incidents were brought to the attention of the responsible administrators, they were promptly corrected. R.T. 684-86; *see* R.T. 84, 86 775-77, Exs. 35, 37, R.T. 862; Ex. 11, R.T. 97; Ex. 6A, R.T. 84,86.[12]

After trial, the Superior Court issued a Notice of Intended Decision, indicating its agreement with Petitioners' contention "that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void." C.T. 375. Thereafter, the Department filed a Motion to Augment Record, requesting the Superior Court to receive detailed evidence regarding the past and continuing discriminatory practices that the Affirmative Action Plan was designed to remedy. C.T. 670-71. The proferred evidence is

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[12] One important factor that must be considered in evaluating some misstatements concerning the Department's policy quoted in Petitioners' Brief is that the statements may have been made by correctional officers hostile to affirmative action, not to correctly characterize the program, but to discredit it. *E.g., compare* Ex. "M" with R.T. 774.

Several of Petitioners' witnesses testified that the former Director of the Department had stated that white males were going to have to wait five years for promotions. *See* Pet. Br. 11. However, the Director denied this (R.T. 284-85) and his testimony was confirmed by other top administrators. *E.g.*, R.T. 369-70, 378-81, 442, 494, 678-79. The Director did state that the effect of the Department's program will be to increase the competitive pool, so that it may take somewhat longer for promotions to be obtained. R.T. 286, 369, *see also* Ex. 10.

The Court of Appeal summarized the record in this respect as follows:

> "According to all the evidence of instances where they had been applied, 'preference' was given to female sex or minority status only to the extent that each was considered a 'plus' factor in the assessment of a particular employee for promotion or transfer . . . ." (Petn. App. A6-A7)

summarized in Appendix B to this brief. The Superior Court denied this Motion, and refused the Department's request for specific findings on the subject of past discrimination, on the ground that prior discrimination was irrelevant. R.T. 1029, 1431-33.[13] Although the Court of Appeal subsequently held that the refusal to augment the record could be upheld on the procedural ground of untimeliness, this was not the ground upon which the Superior Court acted (R.T. 1432-33), and the Court of Appeal also ruled that such evidence could be considered in the event of further trial court proceedings. Petn. App. A23.

Petitioners conceded that there was no evidence that the two named Petitioners, or any other specific individual, had been denied promotions because of their race or sex (R.T. 921-24; C.T. 328-29; *see* C.T. 279-81), and no such finding was entered. However, the Superior Court felt that "discrimination against one is discrimination against all" and that "every employee in the Department, regardless of race, color, creed, background, and so on, was being discriminated against by the policy adopted by the Department." R.T. 1335-36, 1339. Accordingly, the Superior Court entered Findings of Fact to that effect (Petn. App. F4) and conclusions of law and a judgment declaring that the Department's employment practices violated the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), 42 U.S.C. Sections 1981 and 1983, as well as various provisions of California law. Petn. App. E, F7-F9.[14] It also entered a Permanent Injunction prohibiting the

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[13] The Superior Court succinctly stated its views at one hearing at which the motion was being considered:

> "THE COURT: Well, two wrongs don't make a right. And if they've been doing that in the past, it's high time they stopped, you see. That's all it amounts to. I don't see the relevance if they've been discriminating for generations." (R.T. 1029).

The Superior Court did find that the Department's Plan did not remedy *societal* discrimination (Pet. App. F5), but this finding says nothing about whether the Plan was justified by discrimination by the Department.

[14] Based upon findings recognizing "the unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system," the Superior Court provided that race or sex could be considered in determining employee job assignments and responsibilities. Petn. App. F6, G2.

Department "from hiring or promoting any employee . . . in which preference, advantage, or benefit is given to race, color, sex or national origin." Petn. App. G.

The California Court of Appeal reversed. The court concluded that although the Superior Court had properly applied the decision of the California Supreme Court in *Bakke*, under the standards established by this Court's resolution of that case, the Department's Affirmative Action Plan withstood constitutional scrutiny. Without regard to the history of prior discrimination, the Court of Appeal concluded that "there was evidence that the desired 'minority' level could serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system" (Petn. App. A5), and held that in light of "the prison-related realities of race and sex," the Department's personnel practices serve the " 'compelling state interest' in a safe and efficient correctional system." Petn. App. A15-16. With reference to the percentage goals included in the Plan, the Court of Appeal concluded:

> "This language sounds in 'quota' terms, but neither percentage figure bespeaks a 'quota' of the type proscribed in Justice Powell's opinion in *U.S. Bakke*. Each is an optimum 'quota' to the extent that it defines a goal to be attained in the future. Neither is a functional 'quota' which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or nonminority employees." (Petn. App. A16).

With respect to Title VII, the Court of Appeal held that "the fact that the Department is a public employer suggests no basis for excluding it from the reach of the Congressional intent and objectives analyzed in *United Steelworkers* [*v. Weber*, 443 U.S. 193 (1979)], upholding the voluntary adoption of race conscious affirmative action plans". Petn. App. B2.

The Supreme Court of California denied the Petitioners' application for a hearing (Petn. App. "C"), and this Court thereafter granted the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The decision of the Court of Appeal is, under California law, an unqualified reversal which remands the case for a new trial. On retrial, both Petitioners and the Department will be able to present evidence concerning many pivotal factual issues which the Superior Court did not reach because it considered the granting of any racial preference in hiring and promotion to be *per se* unconstitutional. The new evidence necessarily will change the legal issues presented by the case. Thus, the Court of Appeal's decision is not a final judgment.

The state courts had no jurisdiction to consider Petitioners' Title VII claim. Congressional intent to provide for exclusive federal jurisdiction over Title VII claims is expressed both in the statutory languge—which explicitly makes numerous federal statutes and rules of civil procedure applicable to cases brought under it—and in the legislative history. State court jurisdiction would be at odds with the carefully constructed remedial scheme fashioned by Congress. Since the state courts had no jurisdiction over Petitioners' Title VII claim, it may not be considered by this Court.

Should the Court reach the merits of the Title VII claim, the Department's Affirmative Action Plan passes muster under that statute. In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), this Court held permissible under Title VII voluntary affirmative action plans designed to eliminate racial imbalance in traditionally segregated job categories. Such a plan may grant preference to racial minorities provided that it does not "unnecessarily trammel" the interests of white employees. Although *Weber* involved a program adopted by a private employer, its holding is equally applicable to a program voluntarily adopted by a state agency. Title VII applies identical standards to public and private employers, as evidenced by decisions of this Court, the language and legislative history of the 1972 legislation extending Title VII to governmental agencies, and the construction given the statute by the federal agencies entrusted with its administration. Moreover, the reasons which supported the Court's decision in *Weber* are equally applicable to public employers.

Under *Weber,* the Department's Plan is entirely permissible. The program was adopted in response to pronounced underutilization of minorities and women, reflected in a careful analysis of the Department's work force conducted by the Department prior to the adoption of its program. The program was also designed to serve the additional purposes of improving prison security and fostering inmate rehabilitation, objectives which are both proper and consistent with the Department's concurrent objective of eliminating the consequences of its prior discriminatory employment practices. Since the Department's program—which creates no mandatory quotas but simply authorizes consideration of race and sex together with other relevant characteristics in evaluating qualified applicants—affects non-minority workers only imperceptibly, and contains ample safeguards, the program conforms with the standards adverted to in *Weber.*

The Department's consideration of race also satisfies the exacting standards of the Equal Protection Clause, however those standards may be articulated. The state's interest in remedying the effects of prior identified discrimination undoubtedly justifies race-conscious affirmative action programs. The Governor of California and the California Legislature have recognized the existence of prior discrimination in the state's civil service and required state agencies to adopt affirmative action plans; similar findings have been made by Congress and the Department itself. The Department's consideration of race also is justified by the state's compelling interest in maintaining safe and secure prisons. The Department's Plan is both well tailored and necessary to achieve each of these compelling interests; no alternatives which do not involve consideration of race would work as well.

Similarly, the history of *de jure* discrimination against women within the Department justifies the gender-based portion of the Affirmative Action Plan. Under Title VII, consideration of gender for remedial purposes stands on the same footing as consideration of race. Under the Fourteenth Amendment, this Court has created standards which are less demanding than for consideration of race. Moreover, as with race, there are other compelling correctional interests which justify consideration of sex in hiring and promotion.

ARGUMENT

I.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS NOT A FINAL JUDGMENT.

The decision of the California Court of Appeal contemplates further state court proceedings. After declining to decide whether the evidence of prior discrimination proffered by the Department with its Motion to Augment Record was relevant, the court stated that "[i]f the case is to be retried," the relevance of that evidence would be determined in light of Justice Powell's opinion in *Bakke*. Petn. App. A23. The Court also noted *sua sponte* that there were "problems with [Petitioners'] 'standing' " which might affect the state courts' jurisdiction to hear the case; this question, too, the court noted would "require examination" on retrial. *Id.* at A23-24. The pendency of the retrial necessarily means that the decision of the Court of Appeal is not a "final judgment" under 28 U.S.C. §1257.

The issue of state court jurisdiction is, of course, for the state courts to decide, at least in the first instance. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *cf. Paschall v. Christie-Stewart*, 414 U.S. 100 (1973). In light of the Court of Appeal's expressed doubt on this score, it cannot be assumed that there is state court jurisdiction of the case or, therefore, that there is jurisdiction in this Court. *Cf. Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). Depending on the ultimate ruling upon the jurisdiction of the California courts, the decision of the Court of Appeal on the merits of Petitioners' constitutional claims may well be only an advisory opinion which this court is powerless to review. *Doremus v. Board of Education*, 342 U.S. 429 (1952).[15] At the very least,

[15] California courts, which are not subject to the restrictions on jurisdiction imposed by Article III, may determine the merits of causes in numerous situations where the federal courts would lack jurisdiction. *See, e.g., White v. Davis*, 13 Cal. 3d 757, 762-65 (1975)(taxpayer suits); *United Farm Workers v. Superior Court*, 16 Cal. 3d 499, 503-04 (1976)(moot case decided due to "sufficient interest and importance" of question presented).

as in *Paschall v. Christie-Stewart, supra,* the case should be remanded to the state courts so this issue may be decided. Until the state courts decide whether they have jurisdiction of this action, the decision of the Court of Appeal simply is not final.

More importantly, the retrial contemplated by the Court of Appeal may radically transform the questions presented by this case. At a retrial, the Department will be free to introduce the evidence of prior discrimination previously proferred with its Motion to Augment Record.[16] Although the Superior Court found this evidence irrelevant, Petitioners now tacitly admit that this ruling was in error, since they concede that an affirmative action plan may be constitutionally permissible if an employer has "been arguably guilty of prior employment discrimination . . . ." Pet. Br. 20; *see also id.* 31.

If, on retrial, the Department introduces the evidence of prior discrimination which the Superior Court previously refused to admit, the issues which Petitioners claim this case presents will disappear. The first "question presented" by Petitioners' Brief is whether, "*absent proof that it has engaged in previous employment discrimination,* [a State may] voluntarily establish 'goals', set aside positions, and grant preferences in public employment . . . ." Pet Br. i (emphasis added). If, contrary to the Department's contention (*see* pp. 2-4, *supra*), the Court should conclude that the present trial record does not adequately show prior discrimination within the Department, such proof unquestionably will be forthcoming on retrial.

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[16] Under California law, an appellate decision reversing a trial court judgment is, unless otherwise specified, an "unqualified reversal," which "ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings." 6 Witkin, *California Procedure* (2d ed. 1971), Appeal § 543, p. 4484. An unqualified reversal "places the parties in the same position as if the case had never been tried." *Gospel Army v. Los Angeles,* 331 U.S. 543, 546 (1947), citing *Erlin v. National Union Fire Ins. Co.,* 7 Cal. 2d 547, 549 (1936). The parties may thus amend their pleadings and present new facts and legal contentions on retrial, *Gospel Army,* 331 U.S. at 547, unless "the opinion [of the appellate court] as a whole establishes a contrary intention." *Stromer v. Browning,* 268 Cal. App. 2d 513, 518-19, 74 Cal. Rptr. 155, 158 (1968).

Similarly, the other deficiencies which Petitioners assert presently exist in the record (*see, e.g.*, Pet. Br. 13-14, 16, 27, 28) stand to be cured on retrial.

Petitioners, too, may advance their cause on remand. Since the Superior Court granted judgment for Petitioners on the erroneous legal theory that racial and gender preference is *per se* unconstitutional, the case comes to this Court with a record unilluminated by trial court findings on many of the critical issues in the case, including those relating to past discrimination within the Department, the details of the Plan's operations, the correctional interests served by the Department's program, and whether other alternatives would more appropriately further those interests.[17] On remand, both parties may be expected to offer evidence going to these matters; the findings of the trial court necessarily will shape the legal issues appropriate for review, potentially to the advantage of either party. If, for example, the Petitioners should convince the state court that the correctional purposes supporting the Department's plan can be satisfied by minority hiring goals tied to the labor force rather than to the inmate population—an issue not yet considered below—they may still obtain some relief in the California courts.

The dispositive case with respect to the non-finality of the Court of Appeal decision is *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947). There, the state court plaintiff contended that certain state action was unconstitutional; the California Superior Court granted judgment for plaintiff and the Supreme Court of California reversed. Because the California Supreme Court's decision remanded the case for a new trial, that decision was not final, inasmuch as new facts and legal claims might change

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[17] Compare C.T. 605-633, 639-652, 1076-1086, with Petn. App. F. The numerous statements in Petitioners' Brief that the Superior Court decided such issues (*e.g.*, Pet. Br. 3, 4, 12, 13, 15, 16, 18, 27, 28, 29, 39-40) are thus erroneous. Under California law a reviewing court may not assume, as Petitioners imply, that the trial court made omitted findings necessary to support its judgment. Cal. Code Civ. Proc. § 634. While the Court of Appeal made factual findings on some of these issues, which should not be disturbed by this Court unless unsupported by substantial evidence, *General Motors Corp. v. Washington*, 377 U.S. 436, 441-42 (1964), the record as to other issues is unilluminated by findings of either court.

the constitutional questions presented by the case. *Id* at 348. Here, as in *Gospel Army,* the Court should refrain from establishing constitutional doctrine—particularly in an area as sensitive as affirmative action—on the basis of a factual record still open to modification. *See also Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-96 (1956).

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the Court described four categories of cases in which it had accepted jurisdiction of technically non-final state court decisions "without awaiting the completion of the additional proceedings anticipated in the state courts." *Id.* at 477. In their Reply to Respondents' Brief in Opposition (at 8), Petitioners contend that this case falls within the first of these categories, *i.e.,* that here the further course of state court proceedings has been preordained by resolution of the federal issue. *See Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 479. This contention is meritless. As *Cox* explicitly states, this category includes only cases where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478. Here, because retrial is certain to affect the constitutional posture of the case, the federal issue will be affected by the proceedings to come. The case therefore does not fall within the first category described in *Cox.* Since Petitioners do not contend that it falls within any of the others—and it does not—the judgment of the Court of Appeal is not final, and this Court lacks jurisdiction over the case.[18]

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[18] There is also a question whether Petitioners have standing sufficient to give this Court jurisdiction under Article III, an issue addressed in the brief *amicus curiae* filed by the Anti-Defamation League (ADL). Petitioners did not establish at trial that any members of the California Correctional Officers Association, including the individual Petitioners, had failed or would fail to obtain a promotion because of the Department's Plan, and no stipulation was entered concerning any such facts. However, since the Department stipulated to Petitioners' standing (R.T. 1[illegible]4-67), it takes no position on the question raised by the ADL.

II.

TITLE VII DOES NOT PROHIBIT THE DEPARTMENT OF CORRECTIONS FROM VOLUNTARILY ADOPTING AN AFFIRMATIVE ACTION PLAN DESIGNED TO REMEDY THE CONTINUING CONSEQUENCES OF PAST DISCRIMINATION AND TO FURTHER COMPELLING CORRECTIONAL OBJECTIVES.

A. The State Courts Lacked Jurisdiction Over Petitioners' Title VII Claim.

The judgment of the California Superior Court purported to be based in part upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et. seq.* (Petn. App. E2), and the Court of Appeal reversed that judgment only after concluding that the Plan conformed with Title VII standards. Petn. App. B2. While the Petition for Writ of Certiorari indicated the intention to question whether the interpretation of Title VII adopted in *United Steelworkers v. Weber,* 443 U.S. 193 (1979), should be extended to "the public sector" (Petn. 21; *see also id.* 3, 21-26), Petitioners now appear to have abandoned any reliance upon Title VII (*see* Pet. Br. 22, 33; Opposition to Application for Leave to File Brief in Excess of Fifty Pages 3-4) and, we submit, properly so, since the state courts lacked jurisdiction over Petitioners' Title VII claim.

Numerous lower courts have concluded that the language and legislative history of Title VII conclusively demonstrate a Congressional purpose to place exclusive jurisdiction of civil actions under Title VII in the federal courts.[19] While the general rule is that state courts have concurrent jurisdiction of federal claims, Congressional intent to exclude such jurisdiction

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[19] *See Dickinson v. Chrysler Corp.,* 456 F. Supp. 43 (E.D. Mich. 1978); *Fox v. Eaton Corp.,* 48 Ohio St. 2d 236, 358 N.E. 2d 536 (Ohio Sup. Ct. 1967); *Lucas v. Tanner Bros. Contracting Co.,* 10 F.E.P. Cases 1104 (Ariz. Super. Ct. 1974); *see also Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079, 1084 n.5 (8th Cir.), *cert. denied,* 100 S.Ct. 2942 (1980); *cf. Batiste v. Furnco Constr. Co.,* 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975); *Hutchings v. United States Indus., Inc.,* 428 F.2d 303, 310 (5th Cir. 1970)("to the federal court alone is assigned the power to enforce compliance with [42 U.S.C. §2000e-2(a)]"). *But see Bennun v. Board of Governors,* 413 F. Supp. 1274 (D.N.J. 1976).

may be found in the language used by Congress, by incompatibility between the exercise of a federally created right and a state court forum, or from examination of the relevant legislative history. *See Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962); Redish & Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L. Rev. 311 (1976). Each of these criteria supports the conclusion that Congress intended jurisdiction over Title VII claims to be exclusively in the federal courts.

Congress specifically provided that, in many important respects, federal statutes and rules of procedure would be available to expedite Title VII actions and protect the federally created rights of Title VII litigants. Thus, Title VII not only provides that the district courts "shall have jurisdiction" of actions brought pursuant to its provisions (42 U.S.C. § 2000e-5(f)(3)), but specifically provides that federal venue provisions (28 U.S.C. §§ 1404 and 1406) govern such actions (*id.*), that the "chief judge of the district court" shall "immediately" designate a judge to hear Title VII actions (42 U.S.C. § 2000e-5(f)(4)), that the district or circuit court judge so designated shall assign the case for "hearing at the earliest practicable date," that the court may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure" if the case has not been scheduled for trial within 120 days after issue has been joined (42 U.S.C. § 2000e-5(f)(5)), that "[a]ny temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure" (42 U.S.C. § 2000e-5(f)(2)), and that "any civil action brought under this section . . . shall be subject to appeal as provided in sections 1291 and 1292, Title 28" (42 U.S.C. § 2000e-5(j)). It should not be lightly inferred that Congress intended to require the state courts to import in wholesale lots provisions from the Judicial Code and the Federal Rules of Civil Procedure in order to accommodate federal litigants. *See, e.g., Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 218 (1916).

With respect to actions which involve state agencies, Title VII is even more explicit: if efforts at conciliation fail, "[i]n the case of a respondent which is a government, governmental

agency, or political subdivision, . . . the Commission shall take no further action and shall refer the case to the Attorney General *who may bring a civil action against such respondent in the appropriate United States district court.*" If the Attorney General fails to act, aggrieved persons may bring a civil action, although "the court" may permit the Attorney General to intervene 42 U.S.C. § 2000e-5(f)(1) (emphasis added).[20]

The legislative history of Title VII also indicates that Congress intended Title VII actions to be brought only in federal court.[21] "It is significant to note that when reference was made by members of Congress to bringing actions in court, the references were to *federal court.*" *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43, 46 (E.D. Mich. 1978)(emphasis in original).

The statutory scheme compels the same result. As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in enacting the remedial provisions of Title VII, Congress made reference to the broad powers of the federal courts to grant equitable relief: "[F]inal responsibility for enforcement of Title VII is vested with *federal courts.* The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. 42 U.S.C. §§ 2000e-5(f) and (g) (1970 ed., Supp. II) . . . . Taken together, these provisions make plain that *federal courts* have been assigned plenary powers to secure compliance with Title VII." *Id.* at 44-45 (emphasis added).

Thus, the language, legislative history and scheme of Title VII dictate that the exclusive forum for Title VII actions is federal court. Accordingly, as Petitioners now seem to acknowledge, whether the Department's Plan is proper under Title VII is not properly before the Court.

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[20] Similarly, 42 U.S.C. §2000e-6(a) authorizes the Attorney General to bring "pattern and practice" actions "in the appropriate district court of the United States." 42 U.S.C. §2000e-6(b) provides that in such cases, the Attorney General may request the chief judge of the circuit to convene a three-judge court.

[21] For example, the Interpretive Memorandum of Senate floor managers Clark and Case makes repeated reference to actions in "federal court" only. 110 Cong. Rec. 7213 (1964). *See also* 110 Cong. Rec. 13081 (1964) (remarks of Sen. Case); 110 Cong. Rec. 12708, 12722 (1964) (remarks of Sen. Humphrey).

B. The Holding in *Weber* That Title VII Does Not Preclude Voluntary Adoption Of Affirmative Action Plans Is Fully Applicable To State Agencies.

In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), this Court held that Title VII does not prohibit the voluntary adoption of a bona fide affirmative action plan that accords preference to racial minorities if the plan is "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories," *id.* at 209, and if it "does not unnecessarily trammel the interests of white employees." *Id.* at 208. Holding that Title VII "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges [of the unfortunate and ignominious history of discrimination against the Negro in this country]," *id.* at 204, the Court upheld a craft training program which temporarily reserved a fixed percentage of places for blacks, even though there was no prior determination of illegal discriminatory employment practices.

Although *Weber* involved a private employer, the California Court of Appeal properly held that under Title VII the same standards apply to a program voluntarily adopted by a state agency. In *Dothard v. Rawlinson,* 433 U.S. 321 (1977), this Court acknowledged that in amending Title VII in 1972 to apply to governmental agencies, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Id.* at 331 n.14. *See also Washington v. Davis,* 426 U.S. 229, 263 (1976)(Brennan and Marshall, JJ., dissenting); *Regents of the University of California v. Bakke,* 433 U.S. 265, 368 (1978)(Opinion of Brennan, White, Marshall and Blackmun, JJ.). Following *Weber,* the several federal courts of appeal that have considered the question are unanimous that Title VII sanctions the voluntary adoption of race-conscious affirmative action programs by governmental agencies as well as by private employers, even in the absence of a proven history of prior

employment discrimination.[22] The same conclusion has been reached by the Supreme Courts of California and of Washington.[23] *See also* Powers, *Implications of Weber—'A Net Beneath'*, 5 Empl. Rel. L. J. 325, 333-35 (Winter 1979).[24]

Both the text and history of the 1972 legislation extending the reach of Title VII to governmental agencies confirm the soundness of this uniform judicial view. As originally enacted in 1964, Title VII was expressly inapplicable to "a state or political subdivision thereof." Section 701(a), (b), 78 Stat. 253. In the Equal Employment Opportunity Act of 1972, Congress amended Sections 701(a) and (b) to expand the terms "person" and "employer" to include "governments, governmental agencies, [and] political subdivisions." 86 Stat. 103, 42 U.S.C. § 2000e(a) and (b) (1970 ed., Supp. IV). *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). Since the amendments did not modify the applicable substantive provisions defining unlawful employment practices by employers, Section 703(a), 42 U.S.C. § 2000e-2(a), but simply enlarged

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[22] *United States v. City of Miami*, 614 F.2d 1322, 1336 n.27 (5th Cir. 1980); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1850 (1980); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 689 n.7 (6th Cir. 1979), *pet. for cert. pending*, No. 79-1080 (filed Jan. 10, 1980); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, —U.S.—, 48 U.S.L.W. 3698 (April 28, 1980).

[23] *Price v. Civil Serv. Comm'n*, 26 Cal. 3d 257, 274 n.12, 284, *pet. dismissed as moot*, —U.S.—, 49 U.S.L.W. 3244 (Oct. 6, 1980); *Maehren v. City of Seattle*, 92 Wash. 2d 480 (1979).

[24] Prior to *Weber*, it was also the consensus that the statute sanctions remedial decrees imposing upon public employers quotas and related race conscious programs to remedy judicially established prior discrimination. *See, e.g., United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), and *see* 549 F.2d 415, 436-437; *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2nd Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), and *see* 583 F.2d 42 (2nd Cir. 1978); *United States v. City of Buffalo*, 457 F. Supp. 612, 640 (W.D.N.Y. 1978); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 510 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *see also* cases cited in Appelants' Opening Brief in the Court of Appeal at 41 n.23.

the applicability of those provisions to governmental agencies, there is absolutely no indication on the face of the statute of any intention to apply different standards to public bodies.[25]

To the contrary, the legislative history of the 1972 amendments reflects explicit Congressional recognition of the prevelance of discriminatory employment practices among state agencies, particularly in the field of law enforcement, and of the special need for these agencies affirmatively to correct and to eliminate the consequences of those practices. Throughout the debates, both branches of Congress repeatedly took note[26] of two then-recent reports of the U.S. Commission on Civil Rights. The first, *For All The People . . . By All The People, A Report On Equal Opportunity In State And Local Government Employment* (1969), condemned the denial of equal access for minority group members to the growing number of state and local government jobs, finding:

> "4. State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.
>
> (a) A merit system of public personnel administration does not eliminate discrimination against members of minorities. It proclaims objectively, but does not assure it. Discrimination occurs both in recruiting and in selection among final applicants.

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[25] By contrast, the Federal Government remained exempt under the general definition of "employer", 42 U.S.C. § 2000e-(b), and was covered by an entirely separate section newly added to the statute in 1972. Section 717, 42 U.S.C. § 2000e-16. The enforcement provisions are substantially the same with respect to private and state employers, except that the Equal Employment Opportunity Commission ("EEOC") may not initiate a civil action against a state, but may only refer unconciliated complaints to the Attorney General for the filing of suit. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[26] *E.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess., 419 (1971); H. Rep. No. 92-238, 92d Cong., 1st Sess., 17 (1971); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins); 118 Cong. Rec. 1070, 1816, 1819 (1972) (quoting reports); 118 Cong. Rec. 581 (1972), (remarks of Sen. Javits); 118 Cong. Rec. 590 (1972) (remarks of Sen. Humphrey); 118 Cong. Rec. 1070 (1972) (remarks of Sen. Williams); 118 Cong. Rec. 1393-1394 (1972) (remarks of Sen. Saxbe).

> (b) . . . governments have failed to undertake programs of positive action to recruit minority applicants and to help them overcome barriers created by current selection procedures.
>
> (c) Promotional opportunities are not made available to minorities on an equal basis by governments that rely on criteria unrelated to job performance and on discriminatory supervisory ratings." (*Id. 119)*

The 1969 report recommended that state and local agencies adopt programs to "undo any patterns of minority underutilization which had been brought about by past discrimination," and suggested that "[w]here patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time." *Id.* 124; 118 Cong. Rec. 1818 (1972).[27]

The second report, *Mexican Americans And The Administration of Justice in the Southwest* (1970), observed that Mexican-American citizens were "excluded from full participation in law enforcement agencies, especially in supervisory positions," *id.* at iiii, 118 Cong. Rec. 1820 (1972), and conveyed the opinion "that the fear and distrust which many Mexican Americans feel toward law enforcement agencies could be significantly dispelled by increasing the number of Mexican American law enforcement officers at all levels of authority." Report at 83; 118 Cong. Rec. 1824.

Both the House and Senate Committees that reported out the legislation[28] emphasized the serious and widespread nature

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[27] Anticipating the program subsequently adopted by the California Department of Corrections, the Civil Rights Commission recommended that governmental agencies "[d]o not in all cases give preference to non-minority applicants on the basis of higher performance on tests or other hiring criteria, as long as it is apparent that competing minority applicants, especially where they have waiting list seniority, are qualified to do the job" and that such agencies "[i]ndividually appraise the promotion potential and training needs of minority employees, and take action necessary to permit advancement." Report at 126; 118 Cong. Rec. 1818 (1972).

[28] The amending legislation as originally adopted by the House did not contain the provision extending coverage to state and local agencies, as did the Senate version. The Committee of Conference recommended the Senate version. *See* Conference Report, S. Rep. No. 92-681, 92d Cong., 2nd Sess., 15 (1972); H.R. Rep. No. 92-899, 92d Cong., 2nd Sess. 15 (1972).

of employment discrimination in governmental agencies, particularly those involving law enforcement. According to the House of Representatives Report:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, *law enforcement,* and the *administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated.
>
> "This widespread discrimination is evidence that State and local governmental units have not instituted equal employment opportunity required by the national policy to eliminate discrimination in employment." (H.R. Rep. No. 92-238, 92d. Cong., 1st Sess. 17 (1971)(emphasis added)).

See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971). Similar remarks were made on the floor of the Senate. For example, Senator Javits observed:

> "The employment discrimination problem is especially acute in areas where there is heavy minority population. This goes for law enforcement, for education, and for the administration of justice. . . [w]hen the special nature of the state and local governmental activity involved is considered, the case for ending this kind of discrimination is even stronger" (118 Cong. Rec. 581 (1972)).[29]

The legislative history of the Equal Employment Opportunity Act of 1972 has been recognized repeatedly as reflecting endorsement of race-conscious remedies.[30] This history is hardly consistent with any reading of a Congressional intention to bar the voluntary implementation of such programs by governmental agencies. Indeed, Congress intended state

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[29] *See also, e.g.*, 118 Cong. Rec. 3978-79 (1972), (remarks of Sen. Moss); 118 Cong. Rec. 1840 (1972) (remarks of Sen. Cooper); 118 Cong. Rec. 591 (1972) (remarks of Sen. Humphrey).

[30] *See Bakke, supra,* 438 U.S. at 353 n.28 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *Teamsters v. United States,* 431 U.S. 324, 391-394 (1977) (Opinion of Marshall & Brennan, JJ.); *see* E.E.O.C. Guidelines on Affirmative Action, 29 C.F.R. § 1608.4.

agencies to "lead the way" in the adoption of such programs.[31]

Still further support for reading Title VII as amended to endorse voluntary affirmative action programs by public as well as by private employers is provided by the construction given the statute by the federal agencies entrusted with its administration.[32] The Guidelines on Affirmative Action issued by the Equal Employment Opportunity Commission, the agency specifically authorized to promulgate such regulations, 42 U.S.C. § 2000e-12, set forth a three-step procedure to be followed by employers "without awaiting litigation or formal government action" 29 C.F.R. § 1608.1(b); *see id.* § 1608.4. These Guidelines apply not only to private employers, but to all other persons subject to Title VII as defined in Section 701(a) of the Act, including governmental agencies. 29 C.F.R. § 1608.1(b). The inclusion of governmental agencies is consistent with the principles developed in both prior and subsequent administrative policy statements, including the Policy Statement on Affirmative Action Programs for State and Local Government Agencies previously adopted by the Equal Employment Opportunity Coordinating Council,[33] the Memorandum on Permissible Goals and Timetables in State and Local Government Employment Practices,[34] and regulations issued by the

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[31] *See* S. Rep. No. 92-415, 92d Cong. 1st Sess. (1971), reprinted in part at 118 Cong. Rec. 1070, 1071 (1972); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams); 118 Cong. Rec. 1817 (1972); 118 Cong. Rec. 581 (1972) (remarks of Sen. Javits).

[32] Their interpretation is entitled to great judicial deference. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). Compare *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

[33] 41 Fed. Reg. 38814 (1976). This policy statement expressed the views of the EEOC, the Department of Justice, the Department of the Treasury, the Department of Labor, the Civil Service Commission, and the Commission on Civil Rights. The Equal Employment Opportunity Coordinating Council was abolished and all of its functions transferred to the EEOC by President Carter's Reorganization Plan No. 1, 43 Fed. Reg. 19807 (1978).

[34] 2 Employment Practices Guide (CCH) ¶3775 (1976). This statement of policy was developed by the EEOC, the Department of Justice, the Civil Service Commission, and the Department of Labor's Office of Federal Contract Compliance. *Id.* at 2096.

Department of the Treasury,[35] and by the Law Enforcement Assistance Administration.[36]

Finally, this Court's rationale in approving voluntary affirmative action by private employers in *Weber* is equally applicable to public employers. The overriding Congressional design behind the 1972 extension of Title VII to public agencies was to eliminate traditional patterns of racial segregation in public service. As in *Weber*, "an interpretation [of Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute and must be rejected." *Weber*, 443 U.S. at 201-02. In public service no less than private employment, voluntary compliance is "the preferred means for achieving" this objective. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, state agencies, like private employers, are subject to civil liability for violations of Title VII. *Fitzpatrick v. Bitzer*, *supra*. As was true for private employers in *Weber*, *see* 443 U.S. at 209-10 (Blackmun, J., concurring), requiring a public agency to expose itself to liability to minority employees as the price of remedying a pronounced racial imbalance in its work force would deter the adoption of those measures which it is the principal purpose of Title VII to encourage.

C. The Department of Corrections Affirmative Action Plan—Designed Both To Remedy Prior Discrimination And To Advance Other Correctional Objectives—Is Permissible Under *Weber*.

While the trial did not focus upon the overt discrimination which historically permeated the Department of Corrections, there is nonetheless ample evidence that the Department's Affirmative Action Plan was adopted to remedy the discriminatory employment patterns which existed throughout the

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[35] *See* 31 C.F.R. §§ 51.53(d), 51.60(c). The Office of Revenue Sharing, in the Department of the Treasury, enforces the civil rights provisions of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1242.

[36] 28 C.F.R. § 42.203. The LEAA administers federal financial assistance to state and local law enforcement agencies and enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3766(c), and the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5272.

Department when the Plan was adopted. *See* pp. 2-4, *supra*. The Department's analysis of its work force contained within the Affirmative Action Plan reflects a traditional pattern of racial segregation sufficient to justify the adoption of appropriate affirmative action measures under *Weber*. 443 U.S. 193 at 202, 208. This evidence unquestionably constituted *prima facie* proof of prior discriminatory employment practices by the Department of Corrections,[37] and was entirely unrebutted by the Petitioners.

Moreover, as indicated above, prior to the entry of judgment, the Department moved to supplement the record to clarify further the nature of the discriminatory practices that had plagued and continued to affect the Department of Corrections. The disturbing—indeed shocking—evidence which the Department proffered is summarized in Appendix B to this brief. The Superior Court rejected this proffer as irrelevant. Although the Court of Appeal observed that the trial court might properly have excluded the evidence on procedural grounds, it also held that such evidence could be considered should there be further proceedings below. Petn. App. A23. Thus, this case cannot be considered on the plainly incorrect premise suggested by Petitioners, that the Affirmative Action Plan was not adopted to remedy the Department's longstanding discriminatory employment practices.

In reversing the Superior Court, the California Court of Appeal relied on the substantial correctional purposes which are served by the Department's program, and the

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[37] *Teamsters v. United States, supra,* 431 U.S. at 339-40 n.20; *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-08 (1977); *Dothard v. Rawlinson,* 433 U.S. 321, 329-31 (1977); *United States v. City of Miami,* 614 F.2d 1322, 1339 (5th Cir. 1980); *Detroit Police Officers Ass'n v. Young,* 608 F.2d 671, 686 (6th Cir. 1979); *Boston Chapter NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1020 n.5 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). The trial judge's comments suggesting that no further evidence was necessary to establish prior discrimination (R.T. 344, 380, 426-27, 661-62, 708, 883) may be taken as tantamount to judicial notice of matters which, particularly in view of the record before Congress cited above and the numerous judicial findings of unlawful discrimination by law enforcement agencies, are appropriate subjects for judicial notice. *United Steelworkers v. Weber, supra,* 443 U.S. at 199 n.1; *Detroit Police Officers Ass'n v. Young, supra,* 608 F.2d at 690-691; *cf. Electrical Workers Local No. 35 v. City of Hartford,* 625 F.2d 416 (2d Cir. 1980).

reasonableness of that program within the standards articulated by this Court. As discussed in Sections III(C) and (D), *infra,* these objectives are indeed proper and compelling, and the Department's program well-tailored to achieve them without trammeling the rights of non-minority employees. Contrary to Petitioners' assertions (Pet. Br. 3, 13, 32), these objectives are not inconsistent with the Department's concurrent objective of eliminating the consequences of prior discriminatory employment practices. Indeed, as noted repeatedly in the 1972 Congressional debates, discrimination by public entities, particularly law enforcement agencies, is "doubly destructive" (*e.g.,* S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams)), because it adversely affects both the treatment of minority employees and the minority community's perception of the governmental agency. By increasing the representation of minorities and women at all levels and at all penal institutions throughout the Department, the Plan rectifies the prior underutilization and mistreatment of minority and women officers, and in doing so, thereby enhances the Department's performance of its correctional mission. *See* pp. 43-50, *infra.*

No question concerning the significance of expressing the Plan's goals as percentages of the inmate population, or of the necessity for doing so, was explored by either the parties or the courts in the proceedings below, so that examination of this single feature of the Plan by this Court at this time would be inappropriate. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Crowell v. Randell,* 10 Pet. 368, 391 (1836); *cf. Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 271 (1977). Moreover, since the record does not disclose whether, over the life of the Plan, the promotion rate of minorities has exceeded the proportion of minorities in the Department—the relevant labor force of applicants for promotion[38]— it is entirely conjectural whether expression of the

[38] The focus of attention throughout has been upon promotion, the only matter of direct interest to Petitioners, who already hold or represent individuals who hold positions in the Department. The Court of Appeal found that the evidence did not support a finding of discrimination in hiring (Petn. App. A17), and Petitioners' Brief refers to no such evidence.

program's goals in terms of the inmate population rather than of the labor market has made or ever will make any difference to anyone. This is especially true since, as the Court of Appeal found, the Plan's percentages are not fixed quotas, but merely non-mandatory goals for evaluating program performance.

However, if this Court should consider the issue, the expression of the Department's goals as percentages of the service population would render the program no less acceptable under Title VII. The high percentage of minority inmates, and the objectives discussed at pages 43-50, *infra*, to which the Department's goals are responsive, are themselves very much the product of the broader societal mistreatment of those racial minorities which the Civil Rights Act of 1964 was designed to redress. Since the legislative history of the 1972 amendments reflects a strong Congressional purpose to improve effective law enforcement among minorities (*see* pp. 21-24, *supra*), to the extent the Department of Corrections program considers race for this very purpose, it hardly runs afoul of the restrictions of Title VII. As four Justices of this Court pointed out in *Bakke:*

> "Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination *or other compelling ends.*" (438 U.S. at 340 n.17 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.) (emphasis added)).

Cf. *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 716 n.30 (1978).

Furthermore, the language of Sections 703(a) and 703(b), 42 U.S.C. §§ 2000e-2(a) and (b), must be read to prohibit only the invidious forms of racial discrimination which the statute was designed to remedy. *United Steelworkers v. Weber, supra; Bakke,* 438 U.S. at 284-287 (Opinion of Powell, J.); *id.* at 337-340 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 800-01 (1973); *Griggs v. Duke Power Co., supra,* 401 U.S. 424,

429-30 (1971). Employment goals designed to improve prison security, enhance inmate rehabilitation, and counteract racial prejudice among white officers against minority inmates and fellow officers (see pp. 43-50, *infra*) stigmatize no one, because they are not drawn on the presumption that one race is inferior to another and they do not put the weight of government behind racial hatred and separatism. *Bakke, supra,* 438 U.S. at 357-58, 366. *Cf. Johnson* v. *Board of Education,* 604 F.2d 504, 516 (7th Cir. 1979), *cert. granted,* —U.S.—, 48 U.S.L.W. 3852 (July 2, 1980); *Parent Ass'n. of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 719-20 (2d Cir. 1979); *Otero* v. *New York City Housing Auth.,* 484 F.2d 1122, 1132-37 (2d Cir. 1973); *King* v. *Harris,* 464 F. Supp. 827, 837 (E.D.N.Y.), *aff'd* 614 F.2d 1288 (2d Cir. 1979). Accordingly, they cannot be regarded as "discrimination" proscribed by Title VII. *Id.* at 340 n.17; *Bakke v. Regents of the University of California, supra,* 18 Cal. 3d at 67-68; *see Fullilove v. Klutznick,* —U.S.—, 48 U.S.L.W. at 4998 (Opinion of Marshall, J. with Brennan & Blackmun, JJ.); Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism,* 14 Harv. C.R.—C.L. L. Rev. 133, 156-163 (1979).

Even if the language of Sections 703(a) and (b), read literally, were deemed to proscribe the Department's program to the extent that it strives for a racial balancing of correctional officers and inmates, the statutory language should still be subject to an implied defense for compelling reasons of public policy consistent with the basic purpose of the statute.[39] *See generally,* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71

[39] The Department does not rely upon the bona fide occupational qualification ("bfoq") exception contained in Section 703(a), 42 U.S.C. § 2000e-2(e). Under the bfoq exception, *all* persons of a particular religion, sex or national origin may be excluded from consideration in connection with an employment decision based upon a determination that *no* members of that class are likely to be qualified for the position. *See, e.g., Dothard v. Rawlinson, supra,* 433 U.S. at 333-36; *Usery v. Tamiami Tours, Inc.,* 531 F.2d 224, 236 (5th Cir. 1976); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); *Weeks v. Southern Bell Telephone and Telegraph Co.,* 408 F.2d 228, 235 (5th Cir. 1969). No such class exclusion may be made on racial grounds, and the Department's Affirmative Action Plan does not do so.

Mich. L. Rev. 59, 81-89 (1972); Annot. 36 A.L.R. Fed. 9 (1978). An employer may defend against a *prima facie* showing of racially disparate treatment by showing a "legitimate, nondiscriminatory reason" for an employment decision. *McDonnell Douglas Corp.* v. *Green, supra,* at 802. And, although the statute contains no such explicit exception, an employer may defend against a *prima facie* showing that employment practices have a discriminatory impact by showing the job-relatedness of those practices. "Title VII prohibits practices, procedures, or policies which have an adverse impact *unless they are justified by business necessity.*" 29 C.F.R. § 1608.3 (emphasis supplied). *See also Griggs v. Duke Power Co., supra,* 401 U.S. at 431. While this Court has not had occasion to apply such an exception to practices involving explicit consideration of race, as opposed to practices facially neutral but adversely affecting certain racial groups, there is no reason why such an exception should not be equally available in such situations. *See Miller v. Texas State Board of Barber Examiners,* 615 F.2d 650, 653-654 (5th Cir.), *cert. denied* 49 U.S.L.W. 3231 (Oct. 7, 1980). Provided that application of the exception is circumscribed by stringent standards to ensure that it is not misused,[40] compelling public safety objectives may on

[40] In *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971), the Fourth Circuit suggested a standard to govern the applicability of the business necessity defense, similar to that which has been applied to the Equal Protection Clause:

> "Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." [footnotes omitted]

United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd,* 434 U.S. 1026 (1978), suggests an alternative standard of "whether there is available to the employer an alternative practice that would achieve his business purpose equally well but with a lesser disparate impact by race. In examining alternatives, the risk and cost to the employer are relevant." *Id.* at 1115.

relatively rare occasions render essential the express consideration of racial factors just as business necessity may justify consideration of neutral factors which have a racially disproportionate impact. Failure to recognize the exception in such situations would create anomalies that Congress certainly did not intend by the enactment of Title VII. *See Miller v. Texas Barber Examiners, supra.*

This Court's recent decision in *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979), holding that the refusal of the New York City Transit Authority to employ present or former methadone users did not violate Title VII, is predicated on an acknowledgement of the legitimacy of "safety and efficiency" as employment goals; the decision recognizes that rules which bear a "manifest relationship to" such goals do not violate Title VII despite their differential impact on minority races. 440 U.S. at 587 n.31. *See, e.g., Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972). The extraordinary public safety concerns addressed by the California Department of Corrections program are certainly no less compelling. *See* pp. 43-50, *infra.* The Plan's employment goals therefore must be held to pass muster under Title VII.[41]

Because no consideration was given by the California courts to the permissibility of the inmate-related ratios under Title VII, as suggested above these questions may be inappropriate for present decision. If this Court determines that this issue is necessary to a final determination on the merits, the case should be remanded so that the facts and the law may be developed, in the first instance, in the trial court. *See Time, Inc.*

[41] The cases cited by Petitioners to support the proposition that racial classifications designed to serve the "operational needs" of public employers are never permissible (Pet. Br. 30-31) are all inapposite. In most of the cases, the rationale was proffered to justify continued racial segregation of school children. *United States v. Scotland Neck City Bd. of Educ.,* 407 U.S. 484 (1972); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Monroe v. Bd. of Comm'rs,* 391 U.S. 450 (1968); *Brown v. Bd. of Educ.,* 349 U.S. 294 (1955); *Cf. Smith v. Bd. of Educ.,* 365 F.2d 770 (8th Cir. 1966). Here, of course, the Department's goal is not continued segregation but increased integration. *See Johnson v. Bd. of Educ., supra.* As to *Lee v. Washington,* 390 U.S. 333 (1968), *see* pp. 47-48, *infra.* In *Baker v. City of St. Petersburg,* 400 F.2d 294 (5th Cir. 1968), the Fifth Circuit refused to sanction "the blanket assignment of *all* Negroes and *only* Negroes to patrol Zone 13", but explicitly did "not hold that the assignment of a Negro officer to a particular task because he is a Negro can never be justified." *Id.* at 300, 301 (emphasis in original).

v. Firestone, 424 U.S. 448, 463-64 (1976); *Mitchell v. Board of Trustees of Pickens County School Dist.,* 599 F.2d 582 (4th Cir.), *cert. denied,* 444 U.S. 965 (1979). Even if the Court should decide to pass on the question at this time and concludes that these goals are invalid under Title VII, such a conclusion would not invalidate the Department's program as a whole. At most, this conclusion would justify remand for the limited purpose of directing the modification of this single provision of the Affirmative Action Plan by restating the goals with reference to the relevant labor force.

III.

THE FOURTEENTH AMENDMENT DOES NOT BAR CONSIDERATION OF RACE IN CONNECTION WITH THE DEPARTMENT OF CORRECTIONS AFFIRMATIVE ACTION PLAN.

Petitioners' primary claim is based not on Title VII, but on the Equal Protection Clause. Petitioners no longer assert, as they did in the trial court (C.T. 207-11), that consideration of race or sex by a state agency is *per se* unconstitutional, a position foreclosed by numerous decisions of this Court.[42] Instead, they contend that the Affirmative Action Plan does not survive "strict scrutiny" under the Fourteenth Amendment because the Department has failed to show that the Plan furthers a compelling state interest. Pet. Br. 27-35. Petitioners also contend that the Plan is not narrowly tailored to achieve its intended result and that other, non-race-conscious means would achieve the same goals. *Id.* 36-42.

At the outset, we recognize that the Court has not definitively settled the appropriate level of constitutional scrutiny for passing judgment on affirmative action plans. The issue has engendered considerable scholarly[43] as well as judicial

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[42] E.g., *Fullilove v. Klutznick,* —U.S.—, 48 U.S.L.W. 4979 (July 2, 1980) (hereafter *"Fullilove"*); *Bakke, supra; United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 19-20 (1971).

[43] For articles appearing prior to this Court's *Bakke* decision, *see Bakke,* 438 U.S. at 288 n.25. *See also, e.g.,* Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine,* 14 Harv. C.R.—C.L. L. Rev. 7 (1979); Note,

(footnote continued)

commentary, but we shall eschew it here. In this case, as in *Fullilove,* the Department's program "survive[s] judicial review under either 'test' articulated in the several *Bakke* opinions." 48 U.S.L.W. at 4991 (Opinion of Burger, C.J.)[44]

A. Remedying the Effects of Identified Prior Discrimination Is a Compelling State Interest.

California's compelling interest in "ameliorating the disabling effects of identified discrimination" (*Fullilove, supra,* at 4992 (Powell, J. concurring)) can scarcely be overstated. "The line of school segregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its

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Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration, 93 Harv. L. Rev. 938, 949-52 (1980); Wright, *Color-Blind Theories and Color-Conscious Remedies,* 47 U. Chi. L. Rev. 213 (1980).

[44] If, as urged in the remainder of this portion of the brief, the Department's Affirmative Action Plan satisfies the "strict scrutiny compelling state interest" test advanced by Justice Powell in his opinions in *Bakke* and *Fullilove,* it follows *a fortiori* that the plan also passes constitutional muster under the analysis adopted by Justices Brennan, White, Marshall and Blackmun. *See Bakke,* 438 U.S. at 326 n.1. Under that analysis, "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove,* 48 U.S.L.W. at 4998 (Marshall, J. joined by Brennan and Blackmun, JJ., concurring).

To the extent that this intermediate standard of review incorporates elements which are not also subsumed within the compelling state interest standard (*see Bakke,* 438 U.S. at 361), these requirements are also met here. The Department's Affirmative Action Plan does not operate to "stigmatize[ ] any discrete group . . . ." *Id.* at 373. Non-minority males who are not hired or who fail to receive a particular promotion are not "in any sense stamped as inferior," nor is there "a significant likelihood that they will be treated as second-class citizens because of their color" throughout their lives. *Bakke,* 435 U.S. at 375. The program does not stigmatize as inferior its beneficiaries because of the Department's adherence to promoting only the most qualified applicants. *Compare Bakke,* 438 U.S. at 375-376 and *Fullilove,* 48 U.S.L.W. at 4999. Since the marginal impact of the Plan on non-beneficiaries falls equally upon a large number of diverse individuals, the Plan hardly "singles out those least well represented in the political process to bear the brunt of a benign program." *Bakke,* 438 U.S. at 361; *Fullilove,* 48 U.S.L.W. at 4999. The fact that over 70% of all promotions continue to go to non-minorities (C.T. 563) confirms that the Department's Plan does not unduly penalize any individuals or groups.

attainment." *Bakke,* 438 U.S. at 307 (Powell, J.). As the Chief Justice noted in *Fullilove,* achieving "equality of economic opportunity" is a "constitutional mandate." 48 U.S.L.W. at 4990. Even Petitioners acknowledge that "remedying established past discrimination may be a compelling state interest sufficient to justify the limited use of racial classifications by a public entity." Pet. Br. 31.

The Affirmative Action Plan adopted by the Department of Corrections grew out of a pattern of historical underrepresentation of minorities comparable to the backdrop against which the statute upheld in *Fullilove* was enacted. *Compare* 48 U.S.L.W. at 4982-86 with pp. 2-4, *supra.* This underrepresentation was the result of prior discriminatory practices within the Department. *See* pp. 26-27, *supra.* Petitioners contend that this evidence is constitutionally insufficient to sustain the plan because "the Fourteenth Amendment has consistently been held to require prior *intentional* discrimination to justify imposition of racial classifications" (Pet. Br. 34 (emphasis in original)). This argument apparently is based on the unarticulated premises that the use of race-conscious remedial measures is permissible only to remedy prior illegal discrimination; that Title VII did not apply to the Department until 1972; that, prior to that year, state agencies violated the law only if they engaged in the intentional discrimination proscribed by the Fourteenth Amendment under *Washington v. Davis,* 426 U.S. 229 (1976), and that the Department's discrimination prior to 1972 was unintentional.

This argument is meritless for several reasons. First, its factual assumption concerning the nature of the past discrimination within the Department is neither consistent with the record (*see* pp. 2-4, *supra;* Appendix B infra) nor supported by any findings of the trial court. *See* n. 17, *supra.* Second, it is not the law that only prior discrimination which was illegal at the time of its commission may be voluntarily remedied. To the contrary, *Fullilove* indicates that prior discrimination need not be illegal in order to be correctible. *Cf. United Steelworkers v. Weber, supra.* The Chief Justice's opinion in that case upheld the legality of the 10% set-aside without ever inquiring whether the prior discrimination on the part of federal grantees which the set-aside was designed to counter violated applicable law.

Nor did Justice Marshall's opinion propose such an inquiry. And while Justice Powell found that "purposeful discrimination [had] contributed significantly to the small percentage of federal contracting funds that minority business enterprises [had] received" (*id.* at 4995), the report on which he based that conclusion in fact found a mix of both overt and facially neutral discrimination, the latter of which would not have been illegal under the statutes and constitutional provisions cited by Justice Powell.[45] The urgency of remedying prior discrimination simply does not depend on whether that discrimination was illegal at the time of its commission.

Third, even if Respondents were required to show that the acts sought to be remedied constituted violations of law, Petitioners' argument overlooks the fact that California has since at least 1959 prohibited both intentional and unintentional racial discrimination in the state civil service. Section 19702 of the California Government Code, enacted in 1945, provides in relevant part that "[a] person shall not be discriminated against under . . . [the state civil service law] because of . . . race . . . ." This statute has never been construed by the California courts to bar only intentional discrimination.[46] Moreover, Section 1420(a) of the California

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[45] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the Fourteenth Amendment—each cited by Justice Powell—bar only intentional discrimination. As to 42 U.S.C. § 1981, *see Guardians Ass'n. v. Civil Serv. Comm'n*, —F.2d—, 23 EPD ¶ 31,153 (2d Cir. 1980); *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978); and *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *but see Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); and *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (dictum). As to Title VI, a majority of this Court held in *Bakke* that it "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke, supra*, at 287 (Powell, J.); *see also id.* at 328-55 (Opinion of Brennan, White, Marshall & Blackmun, JJ).

[46] This section has been cited by the California Court of Appeal as authority for an affirmative action plan similar to that at issue here. *Dawn v. State Personnel Bd.*, 91 Cal. App. 3d 588, 593 (1979). The Assistant Executive Officer of the California State Personnel Board reported to the Assembly Committee on Public Employees and Retirement that the *Griggs*

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Labor Code, part of the California Fair Employment Act (FEPA), since 1959 has prohibited employers, including the state (§1413(d)), from "discriminat[ing] . . . in compensation or in terms, conditions or privileges of employment" because of race, and the California courts have held that discriminatory intent need not be shown to establish a violation of that section. *Northern Inyo Hospital v. Fair Employment Practice Commission,* 38 Cal. App. 3d 14, 25 (1974). Whether the discrimination practiced against minority employees of the Department prior to 1972 was intentional or not, it was a violation of California law and thus constitutionally remediable under any of the theories enunciated in *Bakke* and *Fullilove.*

B. The Department Was Authorized To Adopt Its Affirmative Action Plan To Remedy the Effects of Identified Prior Discrimination Found To Exist by the California Legislature, Congress and the Department.

In his opinions in *Bakke* and *Fullilove,* Justice Powell has taken the position that "the legitimate interest in creating a race conscious remedy is not compelling unless an appropriate governmental authority has found that [a constitutional or statutory violation] has occurred." *Fullilove, supra,* 48 U.S.L.W. at 4992-93 (Powell, J., concurring); *Bakke, supra,* 438 U.S. at 307-09 (Opinion of Powell, J.). This standard presents no difficulty here since the California Department of Corrections has specifically been authorized—indeed, compelled—to adopt an affirmative action plan in response to the underutilization of minorities within its work force. Its Plan is supported by findings by the California Legislature, by Congress, and by the Department of Corrections itself.

In the Spring of 1971, the California Assembly Committee on Employment and Public Employees held two days of

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case and the Equal Employment Opportunity Act of 1972 had not had a great impact on California, because state law "long had specific provisions requiring nondiscrimination in hiring and the use of job-related selection procedures," citing Cal. Gov't Code §§ 18930 and 19702. Letter of January 21, 1976 from Burton W. Oliver to the Honorable Wadie Deddeh, Attachment "A" at 2; *see also* State Personnel Board Bill Analysis of AB 674 (1972).

hearings on racial discrimination in the state civil service.[47] This Court had recently decided *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and much of the testimony focused on the adverse impact which the State's job qualification and examination process had on minorities.[48] During these hearings, both legislators and witnesses commented on the low percentage of minorities in the Department of Corrections.[49]

Following the hearings, the Assembly Committee issued a "July, 1971 Report on California As An Equal Opportunity Employer." (hereafter "Committee Report") Under the heading, "Need for Affirmative Action", the Committee stated:

> "The Committee concludes that the mere prohibition of discriminatory practices is not enough to effectuate

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[47] Copies of the California legislative materials cited in the following pages have been lodged with the Clerk and furnished to Petitioners. Judicial notice of these materials unquestionably is proper. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *Shapiro v. United States*, 335 U.S. 1, 14 n.19 (1948); *Preisler v. Secretary of State*, 257 F. Supp. 953, 960-66 (W.D. Mo. 1966), *aff'd*, 385 U.S. 450 (1967); *see also Fullilove*, 48 U.S.L.W. at 4981-84 (Opinion of Burger, C.J.); *id.* at 4994-95 (Opinion of Powell, J.); *Zablocki v. Redhail*, 434 U.S. 374, 388 and nn.13-15 (1978).

[48] For example, William Burns, Chairman of the Technical Advisory Committee on Testing to the California Fair Employment Practices Commission, testified that the civil service examinations used by the State Personnel Board would be unacceptable under the *Griggs* decision because there was "very little, if any, evidence indicating that their tests are related to the job." Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Charges of Discrimination in State Hiring Practices (May 12, 1971) (hereafter "May, 1971 Transcript") at 17. He also stated that the "Rule of Three" (under which a state agency hires from the three highest scoring applicants on a particular test) discriminated against minorities. *Id.* at 12-13. Other testimony concerned civil service job qualifications which, like the high school diploma requirement in *Griggs*, had an adverse impact on minorities and were not job-related. *Id.* at 10; Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Charges of Discrimination in State Hiring Practices (April 28, 1971) (hereafter "April, 1971 Transcript") at 24. Testimony also established that the adverse impact which the State's facially neutral civil service policies had on minorities was the result of prior discrimination. May 1971 Transcript at 6.

[49] April, 1971 Transcript at 12. In the course of reviewing the recruitment process for correctional officers, Assemblyman Ketchum stated that the possibility of bias in the oral examination process was "part of this whole discrimination problem." *Id.* at 14-15. Another witness testified that the lack of Mexican-American prison superintendents resulted from discrimination in the Department of Corrections. *Id.* at 87.

> the principle of equal opportunity in state employment. An affirmative action program is needed to achieve this goal." (*Id.* at 10).[50]

On September 23, 1971, Governor Reagan issued Executive Order No. R-34-71, which redefined the "California Code of Fair Practices." The Executive Order stated that "[t]ime and experience have shown that laws and edicts of nondiscrimination are not enough" to achieve equal opportunity; thus, "a personal commitment to affirmative action" on the part of each citizen was required. The Code of Fair Practices promulgated with the Executive Order required each state agency to promulgate "clear, written directives to . . . guarantee equal employment opportunities at all levels of state government." *Id.* California Code of Fair Practices at 2. The Executive Order also required the State Personnel Board to "take positive steps to insure that the entire civil service process is free from conscious, unconscious, or inadvertent bias of any kind." *Id.*

On February 1, 1974, Governor Reagan issued a memorandum to the heads of all California agencies and departments concerning the "State Equal Employment Opportunity Program." Ex. G at 48. The memorandum announced that the State Personnel Board had "accepted the leadership responsibility" in the State's affirmative action efforts and required each state agency and department to "develop and submit to the [State]Personnel Board written equal employment opportunity policies and an affirmative action plan by July 1, 1974 . . . ." *Id.* The Legislature indicated its approval of the Governor's order when it enacted Government Code § 19702.5, Stats. 1974, ch. 1395, requiring the State Personnel Board to provide the Fair Employment Practices Commission with a copy of each

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[50] The Committee's report also contained several recommendations for administrative action by the State Personnel Board, all of which were later incorporated in a resolution passed by the California Legislature. Assembly Concurrent Resolution No. 157. Among other things, the Resolution required the State Personnel Board to review its examination procedures in accordance with *Griggs* (¶2) and to seek out members of minority groups to serve as raters on oral interview panels to guard against the possibility of racial bias in oral examinations. *Id.* ¶ 5. In 1972, the state Civil Service Act was amended by including the specific requirement that hiring and promotion conform to the federal Civil Rights Act of 1964, Cal. Gov't. Code §19702.1, and, in effect, to the teaching of this Court in *Griggs*. *Id.* § 19702.2.

affirmative action plan submitted by a state agency. The Department of Corrections' Plan was promulgated on July 1, 1974, in compliance with Governor Reagan's directive.

The statewide commitment to affirmative action, which prompted the initial adoption of the Department's Affirmative Action Plan in 1974, was reconfirmed prior to the extension of the Department's Plan in 1979. In 1977, the California Legislature adopted a "State Civil Service Affirmative Action Program." Stats. 1977, ch. 943, Cal. Gov't. Code §§ 19790-97. In enacting this statute, the Legislature declared:

> "[b]eyond assurances of nondiscrimination, it is the policy of the State of California to have each state hiring unit initiate comprehensive written affirmative action programs which will take steps to remedy any disparate staffing and recruitment patterns." Stats. 1977, ch. 943 § 1(c).

Section 19790 provides that "each agency and department is responsible for establishing an affirmative action program" and directs that "each agency and department shall establish goals and timetables designed to overcome any identified under-utilization of minorities and women in their respective organizations." These provisions unquestionably reflect the public policy of the State of California. *Price v. Civil Service Commission,* 26 Cal. 3d 257, 276, 277, *petition dismissed as moot,* —U.S.—, 49 U.S.L.W. 3244 (Oct. 6, 1980).[51]

Thus, by the time it enacted Government Code Sections 19790-97, the Legislature had considered evidence reflecting the underutilization of minorities in the State work force,[52] and

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[51] In this injunctive action, the Court must take the law as it now is, not as it was when the action was commenced. *Bradley v. School Bd.*, 416 U.S. 696 (1974). Moreover, when the Assembly considered the bill which enacted Government Code Sections 19790-97 (AB 1350), it was told that the bill "would simply codify present state affirmative action procedures." Legislative Analyst's Analysis of Assembly Bill No. 1350 at 2.

[52] In its 1971 hearings, the Assembly Committee on Employment and Public Employees had discussed a 1969 Report to the Governor giving an ethnic breakdown of the state's work force. *See* Committee Report at 6. The Legislature later passed Assembly Concurrent Resolution No. 157 which, *inter alia,* required the State Personnel Board to "establish a permanent ethnic data reporting system to provide the Legislature with a periodic review of the number of blacks, Mexican-Americans and other minorities in the employ of the State of California." *Id.* ¶ 1. Commencing in 1973, the State Personnel Board has annually provided this information to the Legislature.

showing that this underutilization was due to prior discrimination.[53] In requiring each state agency to undertake affirmative action efforts to remedy any underutilization of minorities within its work force, the Legislature concluded that any such underrepresentation was the result of "disparate staffing and recruitment patterns" (Stats. 1977, Chap. 943, § 1(c)) which had discriminated against minorities. *See also* Cal. Gov't Code §19793. Like the Congress which passed the MBE set-aside, the Legislature concluded that more positive steps than merely proscribing discrimination were required to rectify the effects of such discrimination.[54]

The California Legislature is not the only legislative body which has recognized the existence of racial discrimination in state employment. The Congress—which is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees" (*Fullilove, supra,* 48 U.S.L.W. at 4989 (Opinion of Burger, C.J.))—explicitly found such discrimination to exist when it amended Title VII in 1972 to proscribe discrimination in state and local employment (*see* pp. 21-24, *supra*), and reconfirmed that determination when it

[53] In 1974 and 1975, the Assembly Committee on Employment and Public Employees held hearings relating to discrimination in the state civil service similar to its 1971 hearings. At the outset of the 1974 hearings, the Chairman of the Committee, Assemblyman Deddeh, explicitly linked affirmative action with the need to remedy prior discrimination, by both society-at-large and the State as an employer. Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Equal Employment Opportunity in State Service (September 12, 1974) at 2-3. In connection with the 1975 hearings, the State Personnel Board submitted a "Supplemental Report" which advised the Committee that discriminatory practices were still "deeply imbedded" in the State's employment structure. State Personnel Board, Supplemental Report to Assembly Committee on Public Employees and Retirement at 1 (December 4, 1975). The Supplemental Report also stated that "the State of California has, as the major focus of its equal employment efforts, affirmative actions beyond neutral "nondiscriminatory" and "merit-hiring" policies." *Id.*

[54] There can be no doubt that the Legislature was fully competent both to find that minorities were underrepresented in the state civil service as a result of the agencies' prior discriminatory practices and to authorize state agencies to take effective steps to remedy this disparity. Unlike the Congress, which has only such authority as may be granted by the Constitution, the California Legislature may "exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the constitution." *Methodist Hosp. v. Saylor,* 5 Cal. 3d 685, 691 (1971).

adopted the Crime Control Act of 1973, 87 Stat. 197, and the Crime Control Act of 1976, 90 Stat. 2407, 42 U.S.C. § 3766(c); *see* 119 Cong. Rec. 20070 (1973) (remarks of Rep. Jordan); 122 Cong. Rec. 34118 (1976) (remarks of Rep. Conyers). [55]

In addition to the findings by Congress and the California Legislature, the Department of course was aware of its own prior discriminatory practices when it adopted its Affirmative Action Plan.[56] The breakdown of the Department's work force by ethnicity and gender contained in the Plan, Ex. G at 25-39, "disclosed appreciable imbalances in the ethnic and sex distributions of the California Department of Corrections personnel." *Id.* at 24. And the Department's top administrators had personal knowledge that this imbalance was due to prior discrimination. *See, e.g.*, R.T. 338, 707-08. Nothing in Justice Powell's Opinion in *Bakke* can fairly be read to impair the ability of a responsible public agency to conclude, on the basis of its own self-examination, that it has been guilty of prior discrimination. Indeed, in that case it was conceded that the University had not itself discriminated. *Bakke,* 438 U.S. at 296 n.36. When an agency turns its scrutiny inward and concludes that its own practices have had the intended or unintended result of discriminating against minority groups, the amorphous quality of the inquiry into "societal discrimination" that troubled Justice Powell in *Bakke* completely disappears.

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[55] Of course Congress made no specific findings concerning the California civil service in general or the Department of Corrections in particular. Of necessity, Congress usually acts on a national level, not on a case-by-case basis. *See Oregon v. Mitchell,* 400 U.S. 112, 284 (1970) (Stewart, J., concurring and dissenting). The absence of specific Congressional findings relating to California is as constitutionally irrelevant in this case as the absence of Congressional findings that discrimination in federal contracting had occurred in the New York area (the geographical location of the *Fullilove* plaintiffs) was in that case. *See Fullilove,* 48 U.S.L.W. at 4989; *United States v. City of Miami, supra,* 614 F.2d at 1337-38.

[56] Under California law, the Department of Corrections is the agency entrusted with authority to administer state prisons. *See* California Penal Code §§ 5002, 5054; 15 Cal. Adm. Code §§ 3000, et seq.; *People v. Horton,* 264 Cal. App. 2d 192 (1968). These general provisions in and of themselves may well constitute a sufficient delegation of authority to the Department to determine the need for and to adopt a remedial affirmative action program. *See Sweezy v. New Hampshire,* 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring); *National League of Cities v. Usery,* 426 U.S. 833 (1976); Sedler, *supra,* 14 Harv. C.R.—C.L. L. Rev. at 168.

In all events, here the Department's knowledge of its own prior practices does not stand alone. The adoption of the Affirmative Action Plan was premised not only on self-review, but also on the Governor's command that an affirmative action program be promulgated and Congressional findings that "widespread discrimination" against minorities in state employment existed throughout the nation. By the time a successor plan was adopted in 1979, the gubernatorial command had been reinforced by a further legislative mandate, accompanied by legislative findings of prior discrimination in the state civil service. The Department's adoption and retention of its Affirmative Action Plan is thus supported by constitutionally sufficient authorization and findings.

C. The Department's Affirmative Action Plan Furthers the State's Compelling Interests in Promoting Prison Security and Fostering Inmate Rehabilitation.

Because of social problems deeply ingrained in our society, racial and ethnic minorities are significantly overrepresented among the inmate population. While approximately half of the inmates within California's penal institutions are black or Mexican-American, historically the prison staff has been almost exclusively white male. *See* pp. 4-5, *supra*.[57]

Within the prison population, deep-seated racial hostility is a sad reality with which prison administrators must contend on a daily basis. The testimony at trial established—and Petitioners admit—that California's prisons are "plagued by racial gangs." Pet. Br. 26; *see also* R.T. 340-41, 476, 560, 627, 899; C.T. 525, 561. Many inmates in California's prison system are "intensely conscious of race" and "potentially violent and assaultive." C.T. 510. Many "have never had a satisfactory relationship with anyone of another race. The only contact which many minority inmates have had with white persons has

[57] This situation is not peculiar to California, but exists in most other states. "For too long, minority groups have been overrepresented as offenders and underrepresented as staff. Affirmative action is required to alter the situation created by years of discrimination and indifference." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 599 (1973). *See also, e.g.*, U.S. Commission on Civil Rights, *Civil Rights* 121 (1963); New York State Special Commission on Attica, *Attica: The Official Report*, 106-107 (1972) (hereafter *"Attica Report"*).

been with authority figures and these experiences have generally been unfortunate for the inmate." C.T. 501. Until the adoption of the affirmative action program, "the resentment of minority inmates against white authority figures was further reinforced by a prison situation where the overwhelming majority of correctional officers was white." *Id.*

Because of these attitudes, the specter of racial violence is ever-present in California's prisons. *E.g.*, R.T. 548-64, 896-99; C.T. 494-96, 501, 560-61. The existence of racial hostility within the prisons has been confirmed by academic studies,[58] the writing of minority inmates,[59] prison disturbances in California's prisons and elsewhere,[60] and numerous California

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[58] *Attica Report* 39-40, 79-82, 106-07; Carroll, *Hacks, Blacks and Cons* 91-113, 187, 188 (1974). According to this study:

> "In brief, the white custodians regard the black inmates with a mixture of hostility and fear derived from several sources. As members of the white middle class, they share many of the traditional stereotypes of blacks and see their status threatened by the current wave of black militancy. As correctional officers in a reform-oriented institution, many of their powers and much of their status had been eroded, and this threat—coincident during the latter part of the study period with incidents such as the Attica tragedy—is interpreted to a large extent in racial terms. Thus, on the one hand, the officers see the black prisoners as lazy, ignorant, crude and hypersexual; on the other hand, they view them as dangerous, conspiring revolutionaries whose intentions are not only to challenge the authority of the custodians but quite possibly to seek control of the institution by means of open rebellion.
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> "Such conceptions differ markedly from those the custodians have of the white inmates . . ." (*Id.* at 126-27).

See also, e.g., Denfeld & Hopkins, *Racial-Ethnic Identification in Prison: 'Right On from the Inside,'* 3 Int. J. Criminology & Penology 355, 363-65 (1975); Jacobs, *Stratification and Conflict Among Prison Inmates*, 66 J. Crim. L. & Criminology 476 (1975); Burdman, *Ethnic Self-Help Groups in Prison and On Parole*, 20 Crime & Delinquency 107, 116-117 (1974); Wilbanks, *The Report of the Commission on Attica*, 37 Fed. Probation 3, 4-5 (March 1973).

[59] *See, e.g.*, Malcolm X and Alex Haley, *Autobiography of Malcolm X* (1964); Cleaver, *Soul on Ice* (1968); Jackson, *Soledad Brother: The Prison Letters of George Jackson* (1970).

[60] *See e.g.*, Serrill, *Profile California*, 1 Corrections 3, 33 (Sept. 1974); The Task Force to Study Violence, *Report and Recommendations* (1974) (Record, Ex. "C"; not in evidence); *Attica Report*; Fox, *Racial Issues in*

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appellate cases which describe specific racial incidents.[61] This Court has also recognized the unremitting tension that exists behind prison walls.[62]

There can thus be no doubt of the imperative need to ameliorate these conditions. At stake is not only the orderly and efficient administration of California's correctional system, but the safety of officers, inmates and, on occasion, visitors and other members of the public who may be touched by prison outbursts. Respondents need not denigrate the First Amendment interest in academic diversity found by Justice Powell to be a compelling governmental interest in *Bakke* to state that it scarcely compares, in terms of human life and limb, with the "self-evident" interest in preserving prison order repeatedly recognized by the Court. *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S. at 132 (1977). Petitioners—as prison guards—have a very real and direct stake in preserving prison security; not surprisingly, they advise the Court that they do not "dispute[ ] the interest of the State in reducing racial conflict and violence in its prison system." Pet. Br. 28.

Nor can there be any doubt that increasing the minority composition of the correctional work force at all levels is essential to the accomplishment of this task. There is, in general, greater cultural identification between inmates and officers of the same race, which often enables an inmate to relate more easily to an officer of the same race. R.T. 324-25, 343, 344, 383, 445, 459-61, 620-32, 853, 892-901; C.T. 502, 525-526.[63] There is also a greater ability to communicate—not

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Corrections: Cultured Awareness—How to Achieve It, in Proceedings of the 102nd Annual Congress of Correction of the American Correctional Association 178-80 (1972); Burger, *Our Options are Limited,* 18 *Vill. L. Rev.* 165, 167 (1972).

[61] *See, e.g., People v. Gardner,* 56 Cal. App. 3d 91, 93 (1976); *People v. Hisquierdo,* 45 Cal. App. 3d 397, 405 (1975); *Spain v. Procunier,* 408 F. Supp. 534, 539 (N.D. Cal. 1976), *aff'd in part, rev'd in part,* 600 F.2d 189 (9th Cir. 1979).

[62] *E.g., Jones v. North Carolina Prisoners Union,* 433 U.S. 119, 132 (1977); *Wolff v. McDonnell,* 418 U.S. 539, 562 (1974).

[63] Although Petitioners' witnesses expressed some contrary views (*e.g.,* R.T. 758-59), those witnesses did not, of course, purport to express the reasoning of the Department administration. While the Superior Court

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only between Spanish speaking Mexican-American officers and inmates, but also between other minority staff and inmates whose "ghettoese" is often unfamiliar to white officers from different backgrounds. R.T. 478-79, 550, 564-65, 591, 654-55, 842, 846-47, 853, 893-99, 903; C.T. 500-02, 525-26. And improved communication is an important start to the elimination of friction and needless confrontations. C.T. 502, 504.

Because of this shared cultural identification, minority inmates often will react to the same treatment from minority officers more favorably than from officers of a different race. R.T. 561, 846-47, 896-97; C.T. 502, 510, 525-26, 541. The presence of minority officers also provides a communication vehicle by which administrators are more certain to be advised of inmate grievances and to become aware of prisoner discontent and impending outbursts. C.T. 496-97, 526.[64] In potentially explosive situations, an officer of the same race may be able to quiet a group of inmates that would react violently if approached by an officer of a different race. R.T. 896-97; C.T. 494-96, 525-26; *see also Lee v. Washington,* 390 U.S. 333, 334 (1968)(concurring opinion); *Baker v. City of St. Petersburg,* 400 F.2d 294, 301 n.10 (5th Cir. 1968). In such situations, the

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rejected as irrelevant numerous findings of fact proposed by both sides concerning the effects on inmates and prison conditions of increasing the number of women and minority officers and supervisors (C.T. 621-23, 646-48, 1080-81; R.T. 1427-33), the court did, in Finding No. 19, find that because of the conditions within California prisons, in making job assignments it is necessary to consider the race and sex of employees "in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." Petn. App. F6.

[64] The Chief Justice has written that "every penal institution" should have a "proper grievance procedure [ ]": a "means of having complaints reach decision making sources through established channels so that valid grievances can be remedied and spurious grievances exposed." Burger, *supra,* at 170 (1972). But unless there are minority correctional officers who are trusted by minority inmates to act fairly with their grievances, the means of communication between inmates and custodians will be blocked. *See* Pepper, *Prisons in Turmoil,* 36 Fed. Probation 3, 4 (December 1972); Joint Commission on Correctional Manpower and Training, *Differences That Make The Difference,* p. 67 (1967); Jacobs & Grear, *Dropouts and Rejects: An Analysis of the Prison Guard's Revolving Door,* 2 Crim. J. Rev. 57 (Fall 1977).

presence or absence of minority officers may have a direct and immediate bearing on whether life is lost or needless bloodshed averted. *See, e.g.,* C.T. 494-96, 504, 525-26, 560-61.

This Court's sensitivity to the special needs of prison administration has led it, on many occasions, to accommodate constitutional guarantees to the "self-evident" interest in preserving order and authority in the prisons.[65] As the Court stated in *Bell v. Wolfish,* 441 U.S. 520 (1979):

> "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security." (*Id.* at 547).

These cases cannot be distinguished on the ground that they involve merely the constitutional rights of convicted felons, for they also hold that rights of members of the public may be curtailed due to the compelling state interests in maintaining prison order and security. Thus the Court in *Procunier v. Martinez, supra,* after holding that censorship of prison mail restricts First and Fourteenth Amendment rights of those who correspond with prisoners (*id.* at 409), went on to hold that censorship was nonetheless justified if it furthered "one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.* at 413. *See also Pell v. Procunier, supra,* 417 U.S. at 829-835; *Adderley v. Florida, supra,* n.65.

If the rights of persons only tangentially connected to the prison may be curtailed in the interests of orderly prison administration and security, the same is certainly true of prison employees whose occupational duties are intimately related to prison operation. The Fourth Amendment rights of prison employees "may be diluted by the specialized requirements of discipline, safety and security" necessary for operation of a

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[65] *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977); *Procunier v. Martinez,* 416 U.S. 396 (1974); *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post,* 417 U.S. 843 (1974); *Houchins v. KQED,* 438 U.S. 1 (1978); *Adderley v. Florida,* 385 U.S. 39 (1966).

prison. *Gettlemen v. Werner,* 377 F. Supp. 445, 451 (W.D. Pa. 1974); *United States v. Kelley,* 393 F. Supp. 755 (W.D. Okla. 1975). And persons holding analogous government positions, such as policemen, probation officers, or military personnel, may find their rights substantially restricted. *Brown v. Glines,* 444 U.S. 348 (1980); *Kelley v. Johnson,* 425 U.S. 238 (1976); *Parker v. Levy,* 417 U.S. 733, 753-757 (1974).[66]

The compelling state interest in maintaining prison security has led the Court to permit use of racial and sexual criteria in a manner which accommodates the legitimate needs of prison administrators. When the Court banned racial segregation in prisons, it did so only after finding that the District Court's order requiring desegregation made due "allowance for the necessities of prison security and discipline," and three Justices added explicitly in concurrence that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee v. Washington, supra,* 390 U.S. at 333, 334 (Black, Harlan, and Stewart, JJ., concurring).[67] *See also Cruz v. Beto,* 405 U.S. 319 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, *save for 'the necessities of prison security and discipline'.*" *Id.* at 321 (emphasis added)). The "peculiarly inhospitable" environment of Alabama's prisons has been held to justify the refusal of prison administrators to allow women to serve in "contact positions" in all-male maximum-security institutions, despite the fact that the Court simultaneously held the "bona fide occupational qualification" exception to Title VII to be "extremely narrow." *Dothard v. Rawlinson,* 433 U.S. 321, 334, 336 (1977).

There is an additional interest furthered by the Department's Plan which is sufficiently compelling to justify it: inmate

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[66] *See also, e.g., Byrd v. Gain,* 558 F.2d 553 (9th Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978); *Phillips v. Adult Probation Department,* 491 F.2d 951 (9th Cir. 1974).

[67] In *Fullilove,* Justice Powell cited the three-Justice concurrence in *Lee v. Washington* as evidence of the general proposition that "in narrowly defined circumstances, the presumption [that official action based on racial criteria is inherently suspect and invalid] can be rebutted." *Fullilove,* at 4992 (Powell, J., concurring); *see also Bakke,* 438 U.S. at 287 (Powell, J.).

rehabilitation. Such rehabilitation is among the important governmental interests served by the maintenance of penal institutions. *Procunier v. Martinez, supra,* 416 U.S. at 412; *Pell v. Procunier, supra,* 417 U.S. at 823.

The integration of minority members throughout the correctional work force has a direct and salutory effect on prisoner rehabilitation. C.T. 510. Minority officers provide role models with whom minority inmates identify and whose conduct they may seek to emulate. C.T. 504, 526, 542. The presence of minority officers, particularly in positions of supervision and authority, helps demonstrate to minority inmates that those in authority understand their concerns and will treat them fairly.[68]

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[68] "[B]lack inmates will make a better adjustment to prison life and will conform better to prison routine and requirements if they believe affirmatively that members of their race are being treated fairly and without discrimination on account of race." *Holt v. Hutto,* 363 F. Supp. 194, 205 (E.D. Ark. 1973), *aff'd in part and rev'd in part sub. nom. Finney* v. *Ark. Bd. Corr.,* 505 F.2d 194 (8th Cir. 1974). *Compare McClelland v. Sigler,* 327 F. Supp. 829, 831 (D. Neb. 1971), *aff'd,* 456 F.2d 1256 (8th Cir. 1972).

The need for integration at all levels of the correctional hierarchy to prevent racial discrimination against inmates, and the necessity for explicit consideration of race in achieving this goal, are exemplified by the protracted litigation involving the Arkansas Board of Corrections. There the court rejected the contention that racially neutral hiring was an adequate means to alleviate racial discrimination against inmates:

> "This is not a fair employment practices case. The question is not whether the Department is discriminating against blacks in matters of hirings, promotions, or discharges, but whether the recruitment and promotional policies of the Department are designed to correct or alleviate the racial imbalance of the Department's staff which has contributed so much to the difficulties that the Department has had in the area now under consideration.
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> "What the Department needs to do is not to hire people without regard to race but to make a conscious effort to hire qualified blacks in additional numbers and to place them in positions in the institutions which will enable them to exercise some real authority and influence in the aspects of prison life with which black inmates are primarily concerned.
>
> "The Department needs more blacks who are in positions that will enable them to sit on classification committees and on disciplinary panels, to counsel with inmates about their problems, and to supervise inmates while at work." *Finney v. Hutto,* 410 F. Supp. 251, 267 (E.D. Ark. 1976), *aff'd,* 548 F.2d 740 (8th Cir. 1977), *aff'd,* 437 U.S. 678 (1978).

For these reasons and others,[69] there can be no doubt that several compelling public interests justify the Department's Affirmative Action Plan. "A correctional population where minority groups are highly overrepresented can hardly be well served by a staff that is overwhelmingly white." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 474 (1973).[70] Indeed, it is difficult to imagine a context in which more demanding public objectives might justify such governmental action.[71]

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[69] Increasing the number of minority correctional officers also protects minority inmates against unconstitutional racially discriminatory treatment. C.T. 526-27. *See also Diamond v. Thompson,* 364 F. Supp. 659, 667 n.6 (M.D. Ala. 1973). Prisoners do not shed their right to be free from racial discrimination at the prison gate. *Lee v. Washington, supra; Cruz v. Beto, supra; McClelland v. Sigler, supra; Thomas v. Pate,* 493 F.2d 151 (7th Cir. 1974); *United States v. Wyandotte County,* 480 F.2d 969 (10th Cir.), *cert. denied,* 414 U.S. 1068 (1973); *Holt v. Hutto, supra; Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974). Discriminatory treatment of minority inmates is a well documented phenomenon in prisons staffed by predominantly white personnel (*e.g., Attica Report,* pp. 39-40; Carroll, *supra,* pp. 116-123, 127-130 (1974); *Gates v. Collier, supra,* 349 F. Supp. at 887; *Holt v. Hutto, supra,* 363 F. Supp. at 204) and, unhappily, California's prisons are no exception. C.T. 501, 526-27.

[70] *See also, e.g.,* Association of State Correctional Administrators, *Uniform Correctional Policies and Procedures,* Racial Issues 23-24 (1972); ABA Commission on Correctional Facilities and Services, *A Correctional Must: Increased Staff Recruitment from Minority Groups* 4-5 (1972); Skoler & Loewenstein, *Minorities in Correction—Nondiscrimination, Equal Opportunity, and Legal Issues,* 20 Crime & Delinquency 339 (1974); Pappas, ed., *The Jail: Its Operation and Management* 125 (1970); Carroll, *supra,* at 124-127; *Attica Report,* pp. 79-82, 106-107; National Conference on Corrections, *We Hold These Truths . . .,* p. 85 (1971).

[71] The objectives to be served in integrating the correctional workforce are not unlike those which numerous courts have recognized in ordering other law enforcement agencies to hire and promote minority officers. *E.g., Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n,* 482 F.2d 1333, 1341 (2nd Cir. 1973)("this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement."); *Shield Club v. City of Cleveland,* 370 F. Supp. 251, 256 (N.D. Ohio 1973) ("[a] substantial increase in the number of black and Hispanic police officers in the Department should assist the Cleveland Police Department in administering its overwhelmingly difficult and daily frustrating job of enforcing the law in Cleveland. This is particularly true in the "high crime area" to which the Impact Cities Program is directed."). *See also, Erie Human Relations Comm.*

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D. No Means Other Than Consideration of Race Would Achieve the Same Compelling Governmental Interests.

Under the "strict scrutiny" standard, the Department must demonstrate that the burden which the Affirmative Action Plan places on white employees is "necessary to promote a substantial state interest" which could not equally be served by means other than an explicit racial classification. *Bakke,* 438 U.S. at 320 (Powell, J.). The record below supports the reasonableness of the Department's judgment that there are no racially-neutral alternatives to its Plan.[72] Nor is the effect which the Department's Plan has on white employees unreasonable, in light of the several compelling purposes which the Plan serves. This is so for several reasons.

First, the Department's Affirmative Action Plan affects white male officers only imperceptibly, and far less than many other forms of affirmative action. While special admission programs, such as the one invalidated in *Bakke,* may in practice result in the permanent exclusion of a non-minority applicant from professional education, the principal detriment to any white males affected by the Department's program is to temporarily defer possible promotion. The record demonstrates that despite the Department's Affirmative Action Plan, most promotions are still being given to non-minority officers. C.T. 563; *see* Ex. 2, p. 2, R.T. 43, 45, 440-42, 482-83. If as a result of the affirmative action effort some white males have not obtained a particular appointment they would otherwise have received, there is no evidence that these individuals failed to obtain a promotion soon thereafter. Morever, the Department's program entails no "bumping" and removes no employee from any position or status which he had previously attained. *Compare Kirkland v. New York State Department of*

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v. Tullio, 493 F.2d 371 (3d Cir. 1974); *Pennsylvania v. O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in part and vacated in part,* 473 F.2d 1029 (3d Cir. 1973) (en banc); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974).

[72] While the Department submitted such a proposed finding (C.T. 1084), the Superior Court did not reach the issue because it deemed racial criteria *per se* invalid. Petitioners' proposed findings on this issue (C.T. 623-24, 649) were similarly rejected. Petitioners' statements that the Superior Court found that the Department's Plan did not serve the State's compelling interest in secure prisons (Pet. Br. 3-4, 11-13, 27-28) are thus erroneous.

Correctional Services, 520 F.2d 420, 429 (2nd Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); *Teamsters v. United States,* 431 U.S. 324 (1977). The minimal extent to which the expectations of white employees may be affected by the Department's program, as well as the relatively small number of employees affected, bears significantly on the reasonableness of the program. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747, 794-99 (1976)(Powell, J., concurring and dissenting); *Fullilove, supra,* at 4989 (Opinion of Burger, C.J.); *id.* at 4997 (Powell, J., concurring).[73] Thus, it was not surprising that Petitioners were unable to identify any individual who actually failed to obtain a promotion due to the Department's affirmative action policy.

Moreover, the expectations of some white male officers for earlier promotions necessarily have been predicated in large part on a promotional system in which these officers had a decided advantage. Extending somewhat the waiting period for promotion is an inevitable consequence of bringing minority members within the promotional pool; to the extent that any minority members rise faster than they might have done in the absence of affirmative action, they may be making up for time lost when promotions were not equally available to them, and the white officers temporarily passed over in all probability are losing nothing which they would have had in the absence of prior discrimination.[74]

Second, the California legislation establishes several layers of administrative and legislative oversight for the development and implementation of affirmative action plans. The California State Personnel Board, an agency charged by the California Constitution with the duty to enforce the merit principle in state employment, Cal. Const. Art. VII, §§1(b), 3(a), is responsible for approving all goals and timetables contained in affirmative action plans filed by state agencies. Cal. Gov't. Code § 19790.

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[73] *See also* Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1, 36-41 (1976); Davidson, *Preferential Treatment and Equal Opportunity,* 55 Ore. L. Rev. 53, 75 (1976); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem,* 23 U.C.L.A. L. Rev. 177, 202, 224 (1975).

[74] Karst & Horowitz, *Affirmative Action and Equal Protection,* 60 Va. L. Rev. 955, 965 n.35 (1974); *see Franks v. Bowman Transportation Co., supra,* 424 U.S. at 767-68; Brest, *supra,* 90 Harv. L. Rev. at 37 (1976).

The Board is also required to "[r]eview and evaluate departmental affirmative action programs to insure that they comply with federal statutes and regulations." *Id.* §19792. Each year, the Board must report to the Governor, the Legislature, and the Department of Finance as to the accomplishment of each state agency in meeting its affirmative action goals. *Id.* §19793. The "equal employment opportunity efforts and affirmative action progress" of each state agency is then reviewed by the Legislature during its evaluation of the annual state Budget Act. *Id.* There is thus continuing oversight to ensure that state agencies adhere to proper standards in their affirmative action efforts.

Third, an employee who believes that he or she has been unjustifiably discriminated against by the Department's Plan has several remedies to challenge its implementation. The employee may first pursue a grievance internally within the Department of Corrections. The grievance must be pressed first with the employee's immediate supervisor (if the supervisor has jurisdiction to provide a remedy) and then, if the decision is unsatisfactory, raised with the appropriate division or section chief. Ex. 21 at 2. The grievant may then appeal to the Director of the Department. *Id.* These procedures provide for quick review[75] and ensure that the grievance will come to the attention of the highest policy-makers within the Department.

Following exhaustion of internal administrative remedies, an employee may appeal to the State Personnel Board, which has a mandate "to insure that unlawful discrimination does not occur in the State civil service." 2 Cal Admin. Code § 547; *see id.* §§ 540 *et seq.;* R.T. 236-53. Judicial review of the Board's decision may also be had pursuant to California Code of Civil Procedure Section 1094.5. *See, e.g., Dawn v. State Personnel Board,* 91 Cal. App. 3d 588 (1979).

State law thus provides three different procedural remedies for persons who believe they have been aggrieved by the Department's Affirmative Action Plan, in addition, of course, to those provided by federal law. Here, as in *Fullilove,* "the

[75] The first and second grievance levels are required to respond within 15 days of the submission of the grievance, while the Director has 20 days in which to respond. *Id.*

administrative process gives reasonable assurance that . . . misapplications of the racial and ethnic criteria can be remedied." 48 U.S.L.W. at 4990 (Opinion of Burger, C.J.)[76] Petitioners' claim that the Affirmative Action Plan provides "no appeal rights for non-minorities . . . , adversely affected by it" (Pet. Br. 20) is thus misleading. The Plan does not include an appeal procedure because such remedies already exist.[77]

Fourth, the Department's Affirmative Action Plan was designed as a temporary, five-year measure. Ex. G, cover letter, 11; Ex. R at 18. While the failure fully to achieve its goals within the original time period has required the extension of the plan, the new plan is for only five additional years and will be

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[76] While the Department's Plan does not contain a provision like that found in the statute upheld in *Fullilove,* authorizing the Secretary of Commerce to waive compliance with the 10% requirement in appropriate cases, *id.* at 4985, such a provision is not needed. A numerical quota like the MBE provision must contain provisions for exceptions where meeting the quota may be impossible or inconsistent with the agency's statutory mandate. But the Department's program is not a quota system; it merely authorizes the granting of limited preferences where appropriate in light of the Department's needs for a particular position. The "waiver" is thus inherent in the system; it does not need to be grafted on as an extra protection.

[77] Throughout the trial, the Superior Court frequently expressed doubt as to whether the Department could distinguish individuals who were members of minority groups. *E.g.,* R.T. 37-38, 87-88, 191-94, 229-32, 290-300, 355-68, 679-80. Its findings recite that there is "no scientific or objective basis" for such classification, and no dispute-resolution procedure for any complaints on the basis of improper classification. Petn. App. F5-F6. Petitioners contend that the possibility of an individual improperly claiming a racial preference under the Affirmative Action Plan warrants its rejection. Pet. Br. 41-42.

This issue was not raised by the pleadings nor was it an issue at trial. Indeed, there was no evidence that a dispute has ever arisen as to whether a Department employee had been improperly "placed in one [racial] category, instead of another," nor is there any evidence that the grievance procedures of the Department and of the State Personnel Board described above would not provide an adequate "dispute-resolution procedure" if such a dispute were to arise. Petitioners' claim is purely speculative and not ripe for adjudication. *California Bankers Ass'n. v. Shultz,* 416 U.S. 21, 56 (1974); *Communist Party v. Subversive Activities Control Bd.,* 367 U.S. 1, 78 (1961).

In any event, Petitioners' argument leads to absurd results. The proposition that before individuals may be classified by race, there must be some "scientific" procedure to ensure that the class is not under- or over-inclusive, would be equally applicable to desegregation orders, and, indeed, orders involving any type of class-based relief for racial discrimination. Such a novel requirement would make civil rights litigation virtually impossible.

reviewed annually by the State Personnel Board and the Legislature in accordance with the comprehensive statutory scheme discussed above.

Fifth, the racial hostility and tension plaguing California's prisons simply demands increasing the number of minority correctional officers. That is perhaps the principal reason for which reformulating the Department's affirmative action policy to exclude consideration of race and sex and to substitute such racially neutral characteristics as the ability to relate to minority inmates is not a satisfactory alternative. If such a policy forbid administrators from taking race into account in making employment decisions, it would require the Department to close its eyes to the fact that inmates react to staff in a race-conscious manner, thus affecting the manner in which different applicants will be able to perform. *See, e.g.,* C.T. 494-97, 500-02, 504, 510, 525-26, 542, 560-61. If black inmates need black "role models" to increase minority participation in rehabilitative programs, more sensitive white correctional officers are not the answer. Confronted with many institutions with predominantly black and Mexican-American inmate populations, but virtually no minority supervisors, the fact that an otherwise qualified applicant for a supervisory position is a member of such a minority group unquestionably bears upon that applicant's overall qualifications. *See* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 U.C.L.A. L. Rev. 581, 585-86 (1977).

Sixth, there are no feasible alternatives to consideration of race in hiring and promotion by which the Department can effectively place meaningful numbers of minority members and females at all levels of the Department. Forceful recruitment and special training may bring some additional minorities into the Department, and furnish them with necessary skills for advancement. But recruitment and training are not enough. Even assuming that these steps, coupled with a prospective policy of nondiscrimination, might eventually produce a workforce satisfactorily balanced at all levels (*but see, e.g.,* C.T. 562), this certainly would not happen quickly. Even while the Affirmative Action Plan has been in effect, the increase in

minority employment has been slow. C.T. 566. Yet rectifying the present racial imbalance is urgent in light of the explosive conditions within California's prisons.

The legacy of racial discrimination is such that recruitment and training of minority members and women, together with an official policy of nondiscrimination, is not presently enough to compensate for prior discrimination. R.T. 338, 707-08; C.T. 503. The difficulties inherent in advancing minorities to supervisorial positions are compounded by a low turnover rate and the Department's policy of promoting exclusively from within. C.T. 561, 566. At least until such time as minority members and women are dispersed fairly throughout the supervisory structure, so that all employees are treated and evaluated free from the hidden prejudices of a predominantly white male administrative organization, minority officers will continue to be denied fair opportunity for promotion. C.T. 563; *see also* State Personnel Board, Supplemental Report to Assembly Committee on Public Employees and Retirement at 9.

The Department's Affirmative Action Plan thus represents a considered effort to rectify the effects of historic employment discrimination within the Department and carry out the Department's critical mission, while minimizing the repercussions of its program on the understandable concerns of its predominantly white male staff. The Department believes that there are no feasible alternatives that can be expected to accomplish the same objectives. In light of the deference which the Court repeatedly has given to prison officials trying in good faith to carry out their difficult task,[78] the considered judgment of the Department should not be lightly set aside.[79]

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[78] *Bell v. Wolfish, supra,* 441 U.S. at 547-48, 568-69; *Procunier v. Martinez, supra,* 416 U.S. at 404-05; *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S. at 126; *Meachum v. Fano,* 427 U.S. 215, 228-29 (1976); *Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Wolff v. McDonnell, supra,* 418 U.S. at 561-63; *Saxbe v. Washington Post, supra; Pell v. Procunier, supra,* 417 U.S. at 826.

[79] Petitioners also attack the Affirmative Action Plan because it was not the product of collective bargaining. Pet. Br. 42-44. Their argument overlooks the fact that, as of 1974, when the Department adopted the plan, state agencies had no duty to meet and confer with employee organizations except "upon request" (Cal. Gov't. Code § 3530) and nothing in the record indicates that the CCOA made a request for meet and confer sessions prior to

(footnote continued)

IV.

NEITHER TITLE VII NOR THE FOURTEENTH AMENDMENT PROHIBITS CONSIDERATION OF GENDER IN CONNECTION WITH THE DEPARTMENT OF CORRECTIONS AFFIRMATIVE ACTION PLAN.

The Department's history of discrimination against female job applicants and employees is unambiguous. As late as 1974, women were explicitly barred, as a matter of official policy, from both entry level and supervisorial positions. Ex. "I"; R.T. 258, 557, 559, 608. Even where women were formally eligible for consideration in hiring and promotion, higher standards were imposed on them for equivalent positions. R.T. 211.

The legacy of this explicit *de jure* discrimination was a correctional work force in which the percentage of women employees in 1973 was less than half that in the California labor force as a whole. Ex. "G" at 22. If one excludes clerical employees and other traditionally female positions, the disparity was even greater. *Id.* at 23-24, 35-36.[80] Female employees also earned substantially less than their male counterparts, the result of their concentration in the clerical and subprofessional staff. *Id.* at 23, 32.

The constitutional validity of the Department's efforts to remedy the effects of its prior discrimination simply cannot be doubted. At least three decisions of this Court, *Kahn v. Shevin*, 416 U.S. 351 (1974), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Califano v. Webster*, 430 U.S. 313 (1977), have

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(footnote continued)

the adoption of the Affirmative Action Plan. Morever, nothing in either state or federal labor law requires an employer to obtain *consent* of a union before taking action affecting its employees. The duty of the employer is only to bargain in good faith. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970). Accepting Petitioners' argument would constitutionalize the states' laws concerning collective bargaining with their own employees. *Cf. Branti v. Finkel*, 445 U.S. 507 (1980) (Powell, and Rehnquist, JJ., dissenting).

[80] For example, as of 1973, women accounted for only five of 172 policy making adminstrative positions, eight of 342 correctional captains or supervisors, and 11 of 186 correctional lieutenants. Ex. "G" at 35-36. By contrast, out of a clerical staff of 827, 775 were female. *Id.*

upheld gender-based classifications which served the "laudatory purpose" of "remedying disadvantageous conditions suffered by women in economic . . . life." *Craig v. Boren*, 429 U.S. 190, 198, n.6 (1976). *Schlesinger v. Ballard, supra*, holds that women may be granted preferential treatment in promotion if necessary to assure fairness to female employees adversely affected by other prior or contemporaneous practices of the employer. *Kahn v. Shevin, supra*, and *Califano v. Webster, supra*, hold that the state may explicitly take sex into account if the gender-based classification tends to rectify the subordinate status of women in our economy and society.

Like the statutes upheld in *Kahn, Ballard* and *Webster*, the Department's Affirmative Action Plan was designed to ameliorate the continuing effects of economic discrimination against women. Its purpose, like the challenged statute in *Ballard*, is "to provide women [employees] with fair and equitable career advancement programs". *Schlesinger v. Ballard, supra*, at 508. Since the goal of redressing discrimination against women has been held to justify remedial gender-based classifications, the constitutionality of the Plan in this regard is clear.[81]

Indeed, under *Kahn* and *Webster*, the Department need not even show that *it* discriminated against female employees in order to justify its remedial efforts. The Court in those cases upheld favorable treatment of women on the ground that it ameliorated "our society's longstanding disparate treatment of women," without any showing that the defendants themselves had been guilty of prior discrimination against women. *Califano v. Webster, supra*, at 317; *see also Kahn v. Shevin, supra*, 416 U.S. at 353. In *Ballard*, the Army's prior discrimination against female officers was conceded to have been legal. Hence the claim (Pet. Br. 44-45) that the Department failed to prove its own prior discrimination against women is not only factually incorrect, but also legally irrelevant.[82]

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[81] Petitioners also seem to argue that the Department has failed to show that its gender-based employment preferences are supported under California law. Pet. Br. at 20, 44-45. Even if this were true, the claimed violation of California law is not reviewable here.

[82] Petitioners also contend that Respondents are collaterally estopped from claiming that they have discriminated against women by the case of

(footnote continued)

As with consideration of race, there are other governmental interests justifying consideration of sex in hiring and promotion. There is growing recognition of the importance of including a fair proportion of female officers at virtually all correctional positions to accomplish the compelling state interests discussed in Part III(C), *supra*. Evidence in the record showed that the presence of women tends to improve inmate behavior and reduce violence and, by restoring to institutional life a vital element of normal society, often facilitates the task of rehabilitation. C.T. 505-06, 511-12; R.T. 444, 485-86, 583, 594, 611-13; *see* Ex. 24.[83] The compelling importance of easing prison tensions and promoting rehabilitation of inmates (*see* pp. 43-50, *supra*) and the reasons why less explicit alternatives to the Department's program would be inadequate (*see* pp. 55-56, *supra*) provide as much justification for consideration of sex as for consideration of race. Indeed, whatever skills in race relations may be imparted by training to white officers, the normalizing influence of female presence can hardly be duplicated in the absence of women.

Nor does the Department's program have a severe impact on male officers, as is well-illustrated by contrast with *Schlesinger v. Ballard, supra*. The statute there attacked had the direct result of diminishing promotional opportunities available to male officers in contrast to female officers similarly situated; indeed, the statute imposed automatic loss of employment on those male employees who came within its terms. Here, by contrast, no male employees have been or will be terminated by reason of the Department's Affirmative Action Plan and, in fact, the overwhelming majority of promotions within the Department still go to males. C.T. 563.

The same result obtains under Title VII. *Weber* holds that voluntary affirmative action programs designed to remedy

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Long v. State Personnel Bd., 41 Cal. App. 3d 1000 (1974). Pet. Br. 46 n.12. Contrary to their claim that *Long* upheld "Respondents' policy of issuing "male-only" certifications" (*id.*), that case involved certifications issued by the California Youth Authority. *See* 41 Cal. App. 3d at 1003. The Department of Corrections was not a party to that suit.

[83] *See also* National Conference on Corrections, *We Hold These Truths* . . . , pp. 94-95 (1971); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, pp. 379, 476-77 (1973).

"manifest . . . imbalances in traditionaly segregated job categories" are permissible under that statute. 443 U.S. at [illegible] Nothing in *Weber* limits its reach to redressing racial—as opposed to gender-based—discrimination. Indeed, it would be difficult to imagine a more "traditionally [sex] segregated job category" than correctional officers in all-male prisons. Since race-conscious affirmative action efforts may be subject to stricter constitutional scrutiny than is applicable to analogous actions based on gender (*compare Bakke,* 438 U.S. at 302-03 (Powell, J.) with *Califano v. Webster, supra*), it would be surprising if *Weber* gave employers less flexibility in seeking to redress gender-based wrongs than in seeking to remedy racial discrimination.

CONCLUSION

For the reasons advanced above, the decision of the California Court of Appeal should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted or the action remanded to the state courts for further findings and consideration of the issues not heretofore considered below.

DATED: October 17, 1980.

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APPENDIX A

California Government Code § 18930

Examinations for the establishment of eligible lists shall be competitive and of such character as fairly to test and determine the qualifications, fitness and ability of competitors actually to perform the duties of the class of position for which they seek appointment.

Examinations may be assembled or unassembled, written or oral, or in the form of a demonstration of skill, or any combination of these; and any investigation of character, personality, education and experience and any tests of intelligence, capacity, technical knowledge, manual skill, or physical fitness which the board deems are appropriate, may be employed.

California Government Code § 19702

A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, or marital status except that positions which in the opinion of the appointing power and the board require the services of a specific sex may be reserved to that sex.

California Government Code § 19702.1

Hiring and promotion pursuant to this part shall conform to the Federal Civil Rights Act of 1964.

California Government Code § 19702.2

Educational prerequisites or testing or evaluation methods which are not job-related shall not be employed as part of hiring practices or promotional practices conducted pursuant to this part unless there is no adverse effect.

Nothing in this section shall be interpreted to limit the authority of the State Personnel Board regarding the state merit selection and examining program under Article XXIV of the California Constitution and this division.

California Government Code § 19702.5

(a) The [State Personnel B]oard shall provide to the State Fair Employment Practice Commission a copy of each affirmative action plan, and all subsequent amendments of such plans, adopted by each state agency, department, office or commission.

(b) The board shall annually, commencing January 1, 1975, submit to the State Fair Employment Practice Commission a statistical survey of the employment of each state agency, department, office or commission. The survey shall include, but not be limited to: sex, age, ethnic origin, current employment classification, salary, full-time or other employment status, department and administrative unit, and county of employment of employees.

(c) Such reports and information shall constitute public records.

Statutes 1977, Chapter 943 (California Government Code §§ 19790-97 (Preamble))

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) The State of California remains committed to its policy of nondiscrimination and equal employment opportunity and to continuing and expanding positive programs which will assure the strengthening of this policy. To this end the Legislature accepts leadership responsibility for insuring that equal employment opportunities are available to all applicants and employees in all agencies and departments in the state civil service system.

(b) It is the policy of the Legislature to encourage the state civil service system to utilize to the maximum all available human resources to provide equal employment opportunity to all persons without regard to race, color, religion, national origin, political affiliation, sex, age, or marital status; and, insofar as possible, to achieve and maintain a work force in which are represented the diverse elements of the population of the State of California.

(c) Beyond assurances of nondiscrimination, it is the policy of the State of California to have each state hiring unit initiate comprehensive written affirmative action programs which will take steps to remedy any disparate staffing and recruitment patterns.

(d) This equal employment opportunity policy is adopted to insure that maximum utilization of human resources occurs, that true equality of opportunity is a reality with the State of California, and that the rights of all employees and applicants are safeguarded.

SECTION 2. Chapter 12 (commencing with Section 19790) is added to Part 2 of Division 5 of Title 2 of the Government Code, as follows:

CHAPTER 12. STATE CIVIL SERVICE AFFIRMATIVE ACTION PROGRAM

California Government Code § 19790

Each agency and department is responsible for establishing an effective affirmative action program. The State Personnel Board shall be responsible for providing statewide advocacy, coordination, enforcement, and monitoring of these programs.

Each agency and department shall establish goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations. Agencies and departments shall determine their annual goals and timetables by June 1 of each year beginning in 1978. These goals and timetables shall be made available to the board for review and approval or modification no later than July 1 of each year.

California Government Code § 19791

As used in this chapter:

(a) "Goal" means a projected level of achievement resulting from an analysis by the employer of its deficiencies in utilizing minorities and women and what reasonable remedy is available to correct such underutilization. Goals shall be specific by the smallest reasonable hiring unit, and shall be established separately for minorities and women.

est reasonable hiring unit, and shall be established separately for minorities and women.

(b) "Timetable" means an estimate of the time required to meet specific goals.

(c) "Underutilization" means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability.

California Government Code § 19792

The State Personnel Board shall:

(a) Provide statewide leadership designed to achieve positive and continuing affirmative action programs in the state civil service.

(b) Develop, implement, and maintain affirmative action and equal employment opportunity guidelines.

(c) Provide technical assistance to state departments in the development and implementation of their affirmative action programs.

(d) Review and evaluate departmental affirmative action programs to insure that they comply with federal statutes and regulations.

(e) Establish requirements for improvement or corrective action to eliminate the underutilization of minorities and women.

(f) Provide statewide training to departmental affirmative action officers who will conduct supervisory training on affirmative action.

(g) Review, examine the validity of, and update qualifications standards, selection devices, including oral appraisal panels and career advancement programs.

(h) Maintain a statistical information system designed to yield the data and the analysis necessary for the evaluation of progress in affirmative action and equal employment opportunity within the state civil service. Such statistical information shall include specific data to determine the underutilization of minorities and women. The statistical information

shall be made available during normal working hours to all interested persons. Data generated on a regular basis shall include, but not be limited to, the following:

(1) Current state civil service work force composition by race, sex, age, department, salary level, occupation, and attrition rates by occupation.

(2) Current local and regional work force and population data of women and minorities.

(i) Data analysis shall include, but not be limited to, the following:

(1) Data relating to the utilization by department of minorities and women compared to their availability in the labor force.

(2) Turnover data by department and occupation.

(3) Data relating to salary administration, such as average salaries by race and sex, and comparisons of salaries within state service and comparable state employment.

(4) Data on employee age, and salary level compared among races and sexes.

(5) Data on the number of women and minorities recruited for, participating in and passing state civil service examinations. Such data shall be analyzed pursuant to the provisions of Section 19704 and 19705.

(6) Data on the job classifications, geographic locations, separations, salaries, and other conditions of employment which provide additional information about the composition of the state civil service work force.

California Government Code § 19793

By November 15 of each year beginning in 1978, the State Personnel Board shall report to the Governor, the Legislature, and the Department of Finance on the accomplishment of each state agency and department in meeting

its stated affirmative action goals for the past fiscal year. The report shall include information to the Legislature of laws which discriminate or have the effect of discrimination on the basis of race, color, religion, national origin, political affiliation, sex, age or marital status. The Legislature shall evaluate the equal employment opportunity efforts and affirmative action progress of state agencies during its evaluation of the Budget Bill.

California Government Code § 19794

In cooperation with the State Personnel Board, the director of each department shall have the major responsibility for monitoring the effectiveness of the affirmative action program of the department.

California Government Code § 19795

The secretary of each state agency and the director of each state department shall appoint an affirmative action officer, other than the personnel officer, except in a department with less than 500 employees the affirmative action officer may be the personnel officer who shall report directly, and be under the supervision of the director of the department, to develop, implement, coordinate, and monitor the agency or departmental affirmative action program. The departmental or agency affirmative action officer shall, among other duties, analyze and report on appointments of employees, request appropriate action of the departmental director or agency secretary, submit an evaluation of the effectiveness of the total affirmative action program to the State Personnel Board annually, monitor the composition of oral panels in departmental examinations, and perform other duties necessary for the effective implementation of the departmental and agency affirmative action plans.

The departmental and agency affirmative action officers shall be assisted in these responsibilities by an equal employment opportunity committee as determined by the department whose day-to-day responsibilities are vital to the effective implementation of the affirmative action program.

California Government Code § 19796

Bureau or division chiefs within a department or agency shall be accountable to the department director for the effectiveness and results of the program within their division or bureau. Each bureau or division may assign an administrator to assist the departmental affirmative action officer.

All management levels, including firstline supervisors, shall provide program support and take all positive action necessary to ensure and advance equal employment opportunity at their respective levels.

California Government Code § 19797

Each state agency and department shall develop, update annually, and implement an affirmative action plan which shall at least identify the areas of underutilization of minorities and women within each department by job category and level, contain an equal employment opportunity analysis of all job categories and levels within the hiring jurisdiction, and include an explanation and specific actions for improving the representation of minorities and women.

California Labor Code § 1413

As used in this part, unless a different meaning clearly appears from the context:

. . .

(d) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.

"Employer" does not include a religious association or corporation not organized for private profit.

California Labor Code § 1420

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ him or to refuse to select him for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

. . .

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of the person discriminated against.

APPENDIX B

The following is a summary of the facts concerning the history of employment discrimination within the California Department of Corrections which the Department offered to prove in its Motion to Augment Record. C.T. 670, 688. For the sake of completeness and coherence, to the extent that related evidence was also presented at trial, references to such evidence also are cited below.

Sex-based discrimination within the Department of Corrections was a matter of official policy as recently as 1974. Written job descriptions explicitly barred qualified women from consideration for many positions, both at entry levels and in supervisorial capacities. Ex. "I", R.T. 258, 557, 559, 608; *see* C.T. 874, 880, 945-46, 949, 951-52, 955. Where comparable job opportunities did exist, women were required to meet higher standards than men. R.T. 211; C.T. 974; 952.

Discrimination within the Department against racial and ethnic minorities was more subtle, but nonetheless pervasive. Historically, California correctional officers were recruited from areas where minority members are not to be found. C.T. 705-06, 833, 853-54, 872, 889-90, 899-900, 932-33, 941, 948, 952, 956, 959, 968. Many of the State's penal institutions have been located in rural areas far removed from urban centers of minority populations; most recruitment was by word of mouth among family and friends of existing white personnel. C.T. 705-06, 853-54, 872, 889-90, 932-33, 941, 948, 956, 959, 963-64, 968. The Department conducted no recruiting in urban ghettos or barrios where large numbers of blacks and Mexican Americans reside. Even at those prisons located near large concentrations of minority members—such as San Quentin and Soledad—no attempt was made to recruit from within those areas. C.T. 833, 872, 889-90, 899, 941, 956. Indeed, the Department refused as a matter of policy to recruit through minority media. C.T. 706, 797.

Rather than seeking out minority applicants, the Department of Corrections actively discouraged them. Throughout the Department, white officers feared that minority members were "radicals", that they would subvert Department authority, and that they might join minority inmates in attacking white

officers in the event of prison disturbances. C.T. 709, 841-42, 852, 854, 872-73, 926-27. At many institutions, black and Chicano applicants were openly told by administrators that they were not welcome. C.T. 837-39, 967. At other institutions, such covert mechanisms were employed as intentionally withholding notices of job opening, C.T. 706-07, 911, 972, 977, falsifying the results of qualifying physical examinations, C.T. 708, 972-73, 977, and deliberately disqualifying minority applicants on the basis of subjective oral interviews. C.T. 833, 940-41. According to the present warden of the California State Prison at Folsom:

> "In the course of my duties [prior to 1970], I sat on interview panels to consider applicants for correctional positions in the camp system. During that period, I personally participated on interview panels where decisions were made not to hire otherwise qualified minority applicants for positions in the camp system on the basis that minorities were not acceptable in the predominantly Caucasian rural communities." C.T. 883;18-24.

A disproportionately large percentage of minority applicants was excluded on the basis of written entrance examinations that, by 1964, were known to be culturally biased. C.T. 707-08, 948-49, 956, 993-94. A 1964 Departmental memorandum acknowledged that "the non-white who applies to the Department of Corrections for the position of correctional officer has less than a 10% chance of getting over both the written and oral examination hurdles." C.T. 798.

Those minority members who nonetheless succeeded in obtaining employment were discouraged from remaining. Verbal abuse, intimidation and physical harassment were commonplace. C.T. 833-34, 836-37, 843-44, 851, 854, 864, 891, 894-95, 897, 910, 926-27, 936-39, 969, 973, 977-78. As described by one white male correctional counselor:

> "[A] critical discriminatory factor in that period and one which persists to this day was simply the treatment of minority employees by their peers and supervisors in the Department. Deep-seated prejudices against Chicanos and Blacks were expressed in

> many ways, all of them calculated to intimidate and harass. Minority employees were snubbed, ostracized and often subject to verbal insults and racial name-calling such as "nigger", "buckwheat", "greaser" and "spick". Often the harrassment was petty in nature; lunches would mysteriously disappear from locked rooms or be found to contain urine. In other cases, the behavior ran to fundamental issues of effectiveness and prison security, as when white inmates were incited to harass Chicano and Black officers." C.T. 873.

According to one black male officer, later to become an associate superintendent:

> "[B]lack officers at Chino were frequently treated with disrespect. On one occasion I was ordered by Sergeant Riccardi to bus his dishes although this was not part of my duties as a search and escort officer. When I picked up the tray of dishes to remove them from the room, Sergeant Riccardi kneed me and told me to 'get a move on, boy.' On another occasion I heard an in-service training officer refer to a baton as a 'nigger headcracker.' This remark was made to a class which included black officers." C.T. 936-937.

Minority members were denied customary job orientation, C.T. 840, 884, 895, 903-04, and conscious efforts were made to "bomb out" as many as possible during their probationary period. C.T. 840, 844-45, 851, 970. According to one Chicano officer, who later became a superintendent, who began his career at the California Training Facility at Soledad:

> "Every new employee undergoes a probationary period during which his performance is closely evaluated. Particularly during this period, supervisory personnel and staff members go out of their way to haze new minority employees. In my own experience I recall that I was assigned the gun tower dogwatch when I first began as a CO and my lieutenant used to creep up on my tower through the weeds frequently, trying to catch me asleep and give me a bad report. New Anglo CO's received no similar treatment." C.T. 851.

Minority officers customarily received less desirable duty and shift assignments and were completely excluded from some of the most preferable posts. C.T. 526, 837, 840-41, 845, 849-52, 879, 883-85, 890, 901, 905-07, 912, 927, 930, 936; R.T. 212-13. They often were subjected to arbitrary and unequal discipline. C.T. 837, 845, 851, 885, 903-04, 912, 937, 969. As a consequence of this treatment, many blacks and Mexican-Americans left the Department. *E.g.*, C.T. 844, 845, 855, 875, 886-87, 894, 896, 956, 978.

Minority members who did not succumb to such discriminatory practices were denied advancement opportunities afforded to white officers. Throughout the Department, minorities were systematically excluded from many of the training programs and acting assignments leading to accelerated advancement. C.T. 884-86, 890, 911-12, 929-30, 941-942. Unvalidated written promotional examinations excluded many qualified minority officers from promotional consideration. C.T. 708, 912-13, 948-49, 953, 993-95; R.T. 370-71. Many more were passed over in oral promotional examinations by panels consisting almost exclusively of white males, whose prejudices unquestionably influenced the consistently low evaluations of minority officers. *E.g.*, C.T. 708-09, 842, 879-80, 886-87, 942-43, 953-54, 960-61, 967-68, 978; R.T. 372, 824-25, 833, 872-73, 883. As described by one black officer who finally left the Department in frustration (and who returned after affirmative action efforts had begun):

> "Prior to 1967, I took four written promotional examinations and passed each of them. However, in each case, my overall score on the promotional examination, after including the results of the oral examination was a score which was a small fraction under 77 (i.e. 76.86 and the like). A score of 77 was the minimum passing grade necessary to be placed on the promotional list. At one of the oral examinations which I took, one of the questioners indicated clear hostility to me from the start of the examination session; before I had said a word, it was clear to me that I would not be considered. In 1966, when I was walking in to take the oral examination, an associate warden asked me why I was wasting my

> time taking the promotional examination. On other occasions in 1966, I was told by a program administrator that I should not expect to receive a promotion. Finally, in 1967, I too became discouraged and convinced that I could never obtain a promotion within the Department of Corrections. That is the reason I left the Department in 1967." C.T. 886-887.

When a minority member did manage to rise to the top of a promotional list, various subterfuges were used to circumvent the civil services requirements and to avoid promoting "dumb Mexicans" and blacks. *See* C.T. 853, 877-78, 901-03, 907-08, 942-43, 955. In several instances where minorities were placed in supervisory positions, picketing and strikes occurred. C.T. 709, 879, 969.

Largely because of these discriminatory practices, most institutions within the Department were, as of the 1960's, "virtually all white male organizations." C.T. 704; *see also* Ex. "Q" at 5; R.T. 547, 593, 879, 892-93. In 1963, 91.9% of the staff of the Department of Corrections was Caucasian, C.T. 983.

Although some progress towards improving the racial and sex balance throughout the Department has been made as a result of the Affirmative Action Program, *see* Ex. "N" at 1-2, 12, a pattern of resistance to the employment and promotion of minorities continues at many levels throughout the Department. Newly hired or promoted employees continue to be subjected to various forms of harassment, particularly at institutions where patterns of staff segregation remain acute. *E.g.*, C.T. 835, 853, 873, 874-75, 894-95, 897-98, 910-11, 927-28, 929, 945, 950, 973-74, 978-80. For example, according to the Superintendent of California Conservation Center as Susanville:

> "Although the Department's Affirmative Action Program has made substantial progress in alleviating racial discrimination at many institutions, certain institutions within the Department remain overtly hostile to the hiring of minorities and women. At the California Conservation Center, which has historically been a virtually all-white male institution, minority employees have been physically attacked, have had their tires slashed, have had eggs placed in their

> automobile gasoline tanks, have received threatening telephone calls and letters, and have otherwise been subjected to direct abuse. When the first black lieutenant was assigned to this institution, a snake was put into his room at the bachelor officers' quarters. During a visit to the Center shortly before I became Superintendent [in September 1976], I saw an obscene photograph of a woman and a slogan opposing affirmative action for women posted on a bulletin board. Other literature criticizing affirmative action for minorities has been circulated." C.T. 890-91.

Later, a handbill was circulated by the staff at this institution referring to the former Japanese-American Director of the Department as "the esteemed Kamakazi pilot who prefers to run the Department through his Goddamned affirmative action guidelines", C.T. 891; Dr. Shockley's articles on the genetic inferiority of blacks were widely distributed among the staff at another institution, C.T. 854, and Nazi emblems are still being worn at a third. C.T. 929.

There remains a pronounced absence of minorities at supervisory levels throughout the Department. As of June 1976, minorities held only 13.8% of the supervisory positions within the prisons, and 16.3% of the supervisory positions Department-wide. Ex. "N" at 17, 24; *see also* Ex. "L". At the Sierra Conservation Center at Jamestown, where only 11.4% of the correctional officers were minorities, only 5.5% (six out of 109) of the supervisors at that institution were minority members. Ex. "N" at 17.

With respect to continuing discrimination against women, the program adminstrator at the California Correctional Institution at Tehachapi stated:

> "Although women are no longer overtly excluded from most Departmental employment and the educational requirements for both sexes are now identical women continue to suffer from severe sexual discrimination in the Department. There has been and remains a deep hostility among male personnel toward the very idea of women occupying inmate

> supervisory or administrative positions in a men's institution. This hostility is expressed in many ways, often directly in blunt language, often indirectly through social ostracism and incitement of inmates. As one example, it has been and continues to be common for women officers at the Tehachapi facility to receive nuisance telephone calls, both on and off the grounds. Indeed, sometimes these calls are received over the in-house call boxes during inmate counts, leaving little doubt that it is Department personnel who are responsible. These calls are extremely abusive, similar in kind to one recent instance in which the caller stated: 'Bitch, you're taking up a job from some good man'." C.T. 874-875.

In the opinion of the Department's leadership, the slackening of affirmative action efforts at this time unquestionably would cause a reversion towards the discriminatory patterns of the past. This is so largely because of the lingering hostility towards minorities and women among the predominantly white male middle level supervisors. According to the former Director of the Department:

> "Since the adoption of the Department's Affirmative Action Program, there has been a visible change in the racial composition of the Department's work force, although minorities still are conspicuously absent at several institutions and at supervisory positions in most institutions. As a result of the increased number of minority employees, it has become less acceptable for staff members openly to express their prejudices towards minorities. Nonetheless, in the performance of my duties as Director, I am continually reminded that these discriminatory attitudes are still present, although they are more difficult to detect. The ingrained prejudices of a great many first line and intermediate level supervisors are still such that qualified minority members are regarded as less capable than white males with lesser or, at most, equal qualifications.

Sometimes without realizing it, supervisors assume that a white would be more qualified for a position, and do not in fact give fair and equal consideration to competing minority applicants. Since the selection of the most qualified applicant often depends largely on subjective factors, it is especially difficult to prevent racial prejudice from adversely affecting the promotion of minority applicants.

"It is still common in the Department to encounter highly qualified minority employees who for many years were passed over for promotion. Moreover, institutionally there is still considerable support and protection for white male officers that as a practical matter does not exist for minority officers . .

"Thus, if the administration were compelled to discontinue its conscious efforts to ensure that qualified minority members are promoted within the Department, I believe it is unquestionable under present conditions that minorities would not receive their fair proportion of promotions and that the slight progress in rectifying the historical pattern of discrimination that has been made over the past eight years would be quickly undone." C.T. 979-980

Given present conditions, the senior administrators and the superintendents of every institution in the California prison system are unanimous in their view that there is no effective alternative to the consideration of the race and sex of applicants in making employment selections if minorities and women are to receive fair and equal treatment and a balanced work force is to be achieved in the foreseeable future; in their view, if "forced to close our eyes to race and sex," it will be impossible effectively to counteract the prejudices against minorities and women that are still present after years of discrimination. C.T. 913, 834-35, 845-46, 880-81, 891-92, 908, 950, 974, 979-80.